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THE LAW REVISION COMMITTEE'S SIXTH INTERIM REPORT

BY THE EDITORIAL COMMITTEE
OF THE MODERN LAW REVIEW

THE Sixth Interim Report of the Law Revision Committee[1] deals with the Statute of Frauds and related statutes and the doctrine of consideration, and contains undoubtedly the most important, the most vigorously radical reforms which have been recommended so far. The Committee apparently does not agree with Voltaire that even the worst abuses can become respectable with age, and consequently proposes the eradication of some of the most venerable flaws in the law of contract. It is the purpose of this article to examine briefly some of the implications and effects of the proposed reforms.

[1] Cmd. 5449

The recommended reforms, and their effect on Commercial law and the law of Contract

(*a*) *The Statute of Frauds and related statutes.*

Section 4 of the Statute of Frauds, 1677, is unique in English law. Its interpretation has cost litigants over a quarter of a million pounds; a whole textbook[2] has been devoted to the examination of this fester of caselaw, and in the standard work on sale[3] this section together with section 4 of the Sale of Goods Act, 1893, require one hundred and fifty pages for their elucidation. Vagueness of terminology is but one of the many objections which the Committee records. It would be difficult to make out a more completely damaging case against any enactment, and the Committee can find only one judicial pronouncement in its favour[4], but its provisions have nevertheless been adopted in the Dominions and in the United States, although not in the Indian Sale of Goods Act, 1930. This raises an interesting inquiry. Does the Committee in the course of its deliberations investigate the opinions of Dominion and American lawyers? It is probably desirable that some uniformity should exist between English and Dominion law with respect to more important principles, but it appears that no action has yet been taken in the Dominions on previous reports by the Law Revision Committee.

It is interesting to note some of the criticisms which have been made of section 4 of the Statute of Frauds, and in somewhat less degree of section 4 of the Sale of Goods Act. It is notorious that the apparently haphazard selection of contracts set out in the earlier statutes was determined by special procedural conditions prevailing at the time of its enactment. It is equally notorious that the section defeats not only the perjurer, whom it was intended to foil, but also the honest man who neglects the precaution of a written record of his transaction. Further, the Committee notes that "the section is out of accord with the way in which business is normally done. Where actual practice and legal requirement diverge, there is always an opening for knaves to exploit the divergence."[5] It is, in fact, the accepted practice on a number of Exchanges to disregard section 4 of the Sale of Goods Act, and until post-war conditions produced a stronger spirit of *sauve qui peut* among business men it was rare indeed that any member of these Exchanges invoked the argument of

[2] "The Statute of Frauds, Section 4, in the Light of its Judicial Interpretation," James Williams (Cambridge University Press, 1932).
[3] Benjamin on Sale, pp. 165–313
[4] Lord Kenyon. See p. 6 of the Report.
[5] P. 7.

noncompliance with the section in disputes. The Committee is to be commended for its insistence on the necessity for harmonising law and practice. The Report goes on to say that since the consequence of failure to observe the requirements of the sections is the unenforceability and not the invalidity of the unwritten contract the unhappy impasse which arose in *Morris* v. *Baron*[6] cannot be a rare phenomenon. It is certain that one very useful result of the repeal of these provisions will be the disappearance of the difficulties raised by such cases as *Plevins* v. *Downing*,[7] *Hartley* v. *Hymans*,[8] *Ogle* v. *Earl Vane*[9], *Noble* v. *Ward*[10] and *Morris* v. *Baron*[6] in relation to variation, rescission and substituted performance. *Morris* v. *Baron*[6] in particular is rich in the possibilities of commercial fraud, and it must be only the honesty or ignorance of the business world which is responsible for its comparative neglect for this purpose.

In view of the almost unanimous condemnation of section 4 of the Statute of Frauds and section 4 of the Sale of Goods Act the Committee urges their abrogation. It also calls for the repeal of section 3 of the Mercantile Law Amendment Act, 1856—one of the mitigating expedients designed to reduce the hardships for which the Statute of Frauds was responsible—but says nothing of section 4 of the Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act).[11] This provision was intended to defeat evasion of the necessity for written guarantees by means of actions in tort for deceit by requiring that no actions of any kind could be brought upon a representation as to the character, conduct, credit, ability, trade or dealings of a person with intent that that person should obtain credit, money or goods, unless the representation was made in writing signed by the party to be charged.[12] There can be no logic in retaining a statute, the purpose of which was to prevent evasion of another statute, after that other statute has been repealed. It is, moreover, in connection with guarantees that some misgiving may arise on this part of the Report. Mr. Justice Goddard, Mr. Justice Porter, Mr. Mortimer and Mr. Topham—all lawyers of considerable experience in commercial law—have advocated in a minority report the desirability of requiring writing for guarantees, in order that the unwary and the ignorant may be protected from their willingness to

[6] [1918] A.C.1.
[7] (1876), 1 C.P.D. 220.
[8] [1920] 3 K.B. 475.
[9] (1868), L.R. 3 Q.B. 272.
[10] (1867) L.R. 2 Ex. 135.
[11] 9 Geo. IV. 14.
[12] For a discussion of the purpose of Lord Tenterden's Act see *Banbury* v. *Bank of Montreal*, [1918] A.C. 626.

undertake obligations, the nature or extent of which they do not understand. The guarantee is to be signed by the guarantor or his authorised agent and in the absence of writing the agreement should be void. The arguments adduced by the minority in favour of this suggestion are worthy of a more careful study than the majority appears to have devoted to them. The majority is content to point out that the similar contract of indemnity does not give rise to injustice, and that it is undesirable to preserve the artificial distinction between the two types of contract. But the contract of indemnity is relatively rare in practice; and the artificial distinction could equally well be made to disappear by insisting on writing for both forms of contract.

(*b*) *The doctrine of consideration.*

On the question of consideration the results of the Committee's efforts are less likely to meet with universal approbation. It points out the serious inconveniences which arise from the doctrine and the rules which have grown up around it. It cannot be justified on the ground that it distinguishes between onerous and gratuitous contracts, or between contracts and arrangements not intended to have legal consequences. It breeds technicality in the shape of "nominal" consideration, and is of so uncompromising a character that departures have been necessary in the interest of elementary justice which cannot be defended on grounds of logic (e.g. past consideration given at the request of the promisor may support a subsequent promise). It often defeats the intention of the parties, and permits the most cynical disregard of promises solemnly undertaken (as in *Dunlop* v. *Selfridge*[13]). It is responsible for hardship and inconvenience where it establishes that a gratuitous promise to keep an offer open is not binding, that a promise to pay a lesser sum is no discharge of a greater, that a promise to pay or do what one is already bound to pay or do is no consideration for a counter-promise. In the words of the Report: "Enough has been said to show that to-day in very many cases the doctrine of consideration is a mere technicality, which is irreconcilable either with business expediency or common sense, and that it frequently affords a man a loophole for escape from a promise which he has deliberately given with intent to create a binding obligation and in reliance on which the promisee may have acted."[14]

The Committee summarises its recommendations with respect to consideration under nine heads:—

[13] [1915] A.C. 847.
[14] P. 17.

(i) The Report states that "many of us would like to see the doctrine abolished root and branch. But a recommendation to this effect would probably be unwise. It is so deeply embedded in our law that any measure which proposed to do away with it altogether would almost certainly arouse suspicion and hostility."[15] It therefore proposes that an agreement shall be enforceable if the promise or offer has been made in writing by the promisor or his agent, or if it be supported by valuable consideration past or present. But the consequence of this is that the Committee really does call for the abolition of consideration, not because writing is to be as effective as consideration, but because past is to be as effective as present consideration. Past consideration at the moment is a contradiction in terms, for it is not consideration at all. The consideration of this recommendation has more in common with the *causa* of Continental law than the consideration of present English law.

With respect to writing as an alternative to consideration the Committee expresses itself as in agreement with the views of Lord Mansfield in *Pillans* v. *Van Mierop*[16], but though it is clear that the promise itself must be made in writing, it is not clear from paragraph 29 of the Report (since it speaks of writing and consideration as evidence of an intention to contract), whether writing is to form part of the essential validity of the contract (as that term is interpreted in Private International Law) or whether, like the memorandum under the Statute of Frauds, it is to be merely evidentiary. It is impossible to decide what is to be the precise effect of writing from paragraph 29 and the relevant summarised recommendation. If writing is to be merely evidentiary there is no reason why the promise should be *made* in writing; on the other hand, if writing is to be part of the essential validity of the contract it is inaccurate to speak of it as evidencing an intention to contract or as rendering the contract enforceable. That the distinction is of great practical importance can be seen from cases like *Leroux* v. *Brown*.[17] If writing and consideration are to have the same effect it will be possible to achieve this either by relegating consideration to the position now occupied by writing under the Statute of Frauds, or by promoting writing to the present position of consideration. Lord Mansfield assumed that if consideration and writing are assimilated it must be on the lower level of writing. This probably explains the ambiguity inherent in the language of paragraph 29 and the relevant

[15] P. 17.
[16] (1765), 3 Burr. 1663.
[17] (1852), 12 C.B. 801.

recommendation. The Committee has overlooked the possibility of two alternatives, and although it purports to approve and adopt that described by Lord Mansfield, it really intends to recommend the other. This interpretation is supported by paragraph 30 which declares that even though there be writing or consideration it will still be necessary for the Court to find that the parties intended contractual relations. If writing and consideration were really evidence of *animus contrahendi* further evidence would be superfluous. It seems therefore that the necessity for writing or consideration refers to validity and not enforceability, that if such a case as *Leroux* v. *Brown*[17] were to arise in future it would have to be decided otherwise, and that what is said in *re Bonacina*[18] of the Italian *privata scrittura* would be equally true of English written contracts. It is submitted that in recommendation (2) in paragraph 50 of the Report "valid" should be substituted for "enforceable" and the necessity for proving intention to contract should be stressed as an additional and independent element in the formation of a contract. Similar suggestions have already been made by Professor Holdsworth at p. 48 of Volume VIII of his *History of English Law*, although previous passages are not free from the ambiguity embodied in the Report.

It must be emphasized that the presence of consideration or writing will not conclusively establish the formation of a contract. It will still be necessary to inquire whether the parties intended legal consequences (as in *Rose and Frank* v. *Crompton*,[19] *Farina* v. *Fickus*,[20] *Balfour* v. *Balfour*[21] and other cases). It is probable that this inquiry will be more frequent in future, particularly in those agreements where there is no consideration. On the other hand the mere intention to contract will not be sufficient to establish a contract, for in the absence of both writing and consideration the intention of the parties will still be frustrated.

It should be clearly understood that this recommendation deals only with consideration as a requirement for the formation of contracts and that where consideration is used in some other sense, e.g. to establish the reasonableness of contracts in restraint of trade, it will still be necessary to prove that there is consideration in this other sense.

In advocating the abolition of the rule that past consideration is no consideration the Committee notes that it never applied to actions on cheques or other bills of exchange. No indication is given of the source of this alleged exception or authority for it.

[18] [1912] 2 Ch. 394.
[19] [1925] A.C. 445.
[20] [1900] 1 Ch. 331.
[21] [1919] 2 K.B. 571.

The effect of section 27 (1) (*b*) of the Bills of Exchange Act is that a Bill for a lesser sum is good consideration for the discharge of a larger sum, but there is nothing in the Act to make this true of a purely past consideration. Nor is there any case either before or after the Act establishing this exception, but it will now be unnecessary to examine its authenticity, since it will represent the general rule if the Committee's proposal is adopted.

A matter of considerable difficulty arises in connection with the interpretation of the Committee's recommendations. Are subsequent recommendations on the doctrine of consideration to be taken as subject to this first recommendation? When the Committee proposes that a promise of a particular kind should have a specified effect, is it to have this effect only if made in writing or supported by consideration, or whenever those conditions mentioned in the appropriate recommendation only are fulfilled? This is a problem of the greatest importance as will be seen in connection with options, but no indication of the Committee's intention appears in the Report.

(ii) An agreement to accept a lesser sum in discharge of an enforceable obligation to pay a larger sum shall be deemed to have been made for valuable consideration, but if the new agreement is not performed, then the original obligation shall revive.

The Committee, therefore, favours the abolition of the Rule in Pinnel's Case,[22] one of the most absurd doctrines which have succeeded in becoming established as part of the English law of contract. Ames[23] has argued with great conviction that the Rule was based upon a confusion between consideration and satisfaction, and that so long as mutual promises are consideration for each other there is no reason why a promise to pay a lesser sum should not be consideration for a promise to discharge a larger debt, although neither promise nor payment would operate as satisfaction. That is to say, the creditor would be prevented from recovering the balance, not because the debt was satisfied, but because he had effectively promised to release the debtor. This distinction was observed in some early cases,[24] but these, dropping from the currency of the later law, were not even cited in *Foakes* v. *Beer*[25] in which the House of Lords reluctantly felt itself constrained to approve the Rule in Pinnel's Case. Ames' argument

[22] (1602), 5 Rep. 117.

[23] "Two theories of consideration"—(1899) 12 Harvard L.R. 515; 13 Harvard L.R. 29. Reprinted at p.320—343 of Selected Readings on the Law of Contracts from American and English Legal Periodicals, compiled by The Association of American Law Schools.

[24] E.G. *Goring* v. *Goring* (1602), Yelv. 11; *Pooley* v. *Gilberd* (1612), 2 Bulst. 41 per Fleming, C.J.; *Woolaston* v. *Webb* (1611), Hob. 18.

[25] (1884), 9 App. Cas. 605.

would not apply to the actual payment of a smaller sum, as distinct from a promise to pay it, but the Committee makes it clear that either payment or promise of payment shall be a sufficient discharge, provided that in the case of a promise the original obligation shall revive on failure to implement the promise by payment. It is doubtful whether this latter proviso would be a useful or fair innovation. If the original obligation is to be preserved at all as a reinforcement of the creditor's position it is submitted that this should be so only if the parties intended it. Normally in practice the parties will intend the complete abrogation of the original obligation. The Committee's proposal that there should be an automatic revival of the larger debt is no doubt a consequence of the influence of Pinnel's Case on lawyers brought up to consider it binding law.

(iii) An agreement in which one party makes a promise in consideration of the other party doing or promising to do something which he is already bound to do by law, or by a contract made either with the other party or with a third party, shall be deemed to have been made for valuable consideration.

Here again there was never any reason why a promise to do what one is already bound to do should not be consideration for another promise, since mutual promises are consideration for each other. But this is not clearly established by the cases, and it is impossible to say with any great certainty what the result of the sparse caselaw on this topic is, as can be seen from the differing views of Ames, Williston, Corbin, Langdell, Holdsworth and others in the collection of essays entitled "Selected Readings on the Law of Contracts." Recommendations (ii) and (iii) will confirm as law Ames' conclusions in *Two theories of consideration.*

(iv) A promise shall be enforceable by the promisee though the consideration is given by or to a third party.

The Committee deals with the rule that consideration must move from the promisee as distinct from that relating to the *jus quaesitum tertio.* It applies to the case where C is a party to a contract between A and B but provides no consideration. A good deal of the inconvenience of the present rule can be evaded by the application of Lord Atkin's views as expressed in *McEvoy* v. *Belfast Banking Co.*[26] and by their extension in holding that where B contracts for B and C he not only contracts as the agent of C but also provides the consideration as C's agent.[27]

(v) An agreement to keep an offer open for a definite period

[26] [1935] A.C. 24.
[27] See *Fleming* v. *Bank of New Zealand,* [1900] A.C. 577.

of time or until the occurrence of some specified event shall not be unenforceable by reason of the absence of consideration.

It is not clear, as has been pointed out, whether all promises to keep offers open for a specified period are to be binding, or whether it is intended that this shall be true of only those supported by consideration or made in writing. Further, the Report is silent on the relation of this recommendation to section 40 of the Law of Property Act, 1925.

(vi) A promise made in consideration of the promisee performing an act shall constitute a contract as soon as the promisee has entered upon performance of the act, unless the promise includes expressly or by implication a term that it can be revoked before the act has been completed.

The Report distinguishes between "bilateral" and "unilateral" contracts, the former being those in which there is a promise for a promise, the latter a promise for an act. The use of the terms "bilateral" and "unilateral" is to be deprecated; they are employed elsewhere in the law with different connotations, and in the sense for which they are employed in the Report their use has been abandoned by modern authors who prefer "executory" and "executed."

At the moment where there is a promise for an act, in the absence of provision to the contrary, there is no binding contract until the act is completed, so that the promisor may withdraw at any time before the promisee has completed the act. In practice this does not give rise to much hardship because few people will be found with sufficient trust in the honesty of their fellows to proceed to the performance of an onerous act without the precaution of an executory contract.

(vii) A promise, which the promisor knows, or reasonably should know, will be relied on by the promisee, shall be enforceable if the promisee has altered his position to his detriment.

This will remove a hardship of less frequent occurrence, but it would perhaps be more reasonable to emphasize that it is the knowledge of the promisee's likelihood to act in reliance on the promise and not the knowledge of the certainty of his acting which should be the ground for relief here.

(viii) Where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name, subject to any defences that would have been valid between the contracting parties. Unless the contract otherwise provides, it may be cancelled by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.

The rule that a stranger to a contract cannot maintain an action upon it has been one of the most unsatisfactory features of the law relating to consideration. It has been tenaciously adhered to in all but a few cases of minor importance.[28] The rule is completely out of harmony with the conditions of modern commerce and industry. The Report refers specifically to the difficulties which might arise from an application of the rule to Bankers' Commercial Credits and compliments bankers on their reluctance to rely upon legal technicalities. Not a little could be said on the equal good sense of the bench in deciding cases in conformity with commercial practice rather than legal principle. See for example *Urquhart Lindsay & Co., Ltd.* v. *The Eastern Bank*.[29] For other examples of this tendency see *Hirachand Punamchand* v. *Temple*[30] and the *Strathcona* Case.[31] But the possibilities of evading the rigid requirement of privity of contract are limited, and the many unhappy consequences are too notorious to call for enumeration here. Mention may be made of a recent example in *Vandepitte* v. *Preferred Accident Ins. Co. of New York*[32] since it illustrates the difficulty which must arise where policies of insurance contain provisions in favour of relatives or friends. (For a bold evasion of the Common Law see the decision of Roche J., in *Williams* v. *Baltic Association of London*[33].) Although the Road Traffic Act, 1930, s. 36 (1) (*b*), eliminates the hardship with respect to road accidents, it remains in other types of insurance e.g. where a fire policy covers the goods of domestics or a burglary policy the goods of guests.

The Report discusses the *jus quaesitum tertio* which is conferred by means of a trust. Corbin[34] has suggested that it should be inferred today in all cases where a contract bestows a benefit on a third party. The Committee does not adopt this suggestion, finding the proposed solution too cumbrous. But it does not call for the abolition of the trust which may arise under contracts, so that it may be possible for a third party to rely on it in future where he could not sue on the contract because the benefit was not expressly conferred or because the contract has been cancelled before the third party adopted it.

It seems that this and other recommendations of the Committee will be responsible for a more frequent invocation of public policy in order to check the increased enforceability of promises.

[28] See Report, p. 25.
[29] [1922] 1 K.B. 318.
[30] [1911] 2 K.B. 330.
[31] *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.*, [1926] A.C. 108.
[32] [1933] A.C. 70.
[33] [1924] 2 K.B. 282.
[34] Contracts for the Benefit of Third Persons (1930), 46 L.Q.R. 12.

Proposal (viii) will make it possible to create vast schemes of price fixing which may rapidly require control in the public interest. Proposal (vii) may make it possible to sue on a promise not to commit an illegal act unless public policy declares such promises invalid.[35] Contracts based upon promises to perform a public duty will call for careful supervision.[36] This question of public policy is merely one illustration of the widespread effect which the prosposed reforms will have on the whole fabric of the law of contract. They are like stones thrown into a pool, producing unexpected ripples far from the centre of disturbance. What is to become of recovery of money for total failure of consideration? What will be the effect on recovery of money paid under compulsion not amounting to duress—possible at present on the ground that there is no consideration for the payment?[37] These and innumerable similar questions will appear in the wake of the new law.

(ix) A life endowment or education policy shall be enforceable by the person whose benefit the policy is expressed to be issued for subject to such provisions for the protection of creditors as are contained in s. 11 of the Married Women's Property Act, 1882.

This provision is designed to give the beneficiaries a property right, since the previous recommendations will give only a contract right.

Law of Trusts, Conveyancing, and Evidence

If the recommendations are adopted as they stand there will be some curious discrepancies between the law of contract and the law of trusts. S. 53 (1) of the Law of Property Act requires a declaration of trust of land to be manifested and proved by writing. This together with s. 40 will be unaffected by the changes. Again, awkward problems may arise with respect to incompletely constituted Trusts. At present these trusts are enforceable by the trustees (in covenant) and by the beneficiaries who have given valuable consideration. These latter do not include the next of kin, who are looked upon as volunteers. If therefore the property has not been handed over to the trustees, the parties to the settlement are dead and there are no children, the trust fails so far as the next of kin are concerned for they have not given consideration, and the trustees are usually statute-barred. (See *Re Plumptre's Marriage Settlement*[38]. *Cf. Pullan* v.

[35] See "Blackmail and Consideration" by Professor Goodhart, (1928), 44 L.Q.R. 436; Essays in Jurisprudence and the Common Law, p.174.
[36] See *Glasbrook* v. *Glamorgan County Council*, [1925] A.C. 270.
[37] See *Maskell* v. *Horner*, [1915] 3 K.B. 106.
[38] [1910] 1 Ch. 609.

Koe[39].) If writing is to be considered of equal efficacy with consideration throughout the whole law, it would appear that the next of kin in these circumstances would be able to enforce the settlement. This is perhaps only one of the many cases in which equity may depart from its settled practice of refusing to assist persons at present treated as volunteers. It cannot be pretended that the Committee has been very much concerned with the impact of its proposals upon equity. This may be due to the fact that it is a Common Law Committee and much stronger on the common law than upon the equity side. It is to be hoped that before legislation is introduced careful study will be given to the influence of any proposed measure on equity.

It may become necessary to recast the law relating to settlements on the bankruptcy of the settlor. S. 42 (1) of the Bankruptcy Act applies to voluntary settlements only. If the Report is adopted it seems that settlements for past consideration will be outside the section; but will the fact that a settlement is in writing of itself prevent the application of the section? This can hardly be intended by the Committee, but the point should be clarified. The position of s. 172 of the Law of Property Act may be somewhat similarly affected, although it appears that even now settlements cannot be avoided as against persons taking in good faith who have given good though not valuable consideration.

It should be noted that the Committee considered that s. 40 of the Law of Property Act was not within its terms of reference, and therefore abstained from any examination of the desirability of its retention. It would probably not have adopted this attitude, had it not considered that inclusion in the property legislation of 1925 indicated approval by the framers of this part of s. 4 of the Statute of Frauds. It is doubtful, however, whether s. 40 applies with uniform success to all contracts relating to land e.g. contracts for short tenancies, although the doctrine of part performance does much to relieve hardship. Few conveyancers would advocate the unqualified repeal of the section, since at the present time the investigations and general preparation for the contract for the sale or disposition of land are of the utmost importance. If an oral contract is to be enforceable lay clients will frequently bind themselves before their advisers have completed investigations on their behalf. It is submitted, therefore, that the exceptional treatment of these contracts is not illogical in view of the extremely technical nature of the land law. On the other hand not all the features of the memorandum which suffices at present are satisfactory, and reform would not be

[39] [1913] 1 Ch. 9.

unwelcome in this respect. The remedy might be found in requiring that the contract itself should be in writing.

The recommendations should be studied in relation to the law of evidence as well. Hitherto the rule that no extraneous evidence is admissible where the contract has been embodied in writing has been subject to many exceptions even where writing is required by the Statute of Frauds. It is apparently intended that so far as the new type of written contract is concerned no extrinsic evidence shall be admissible, except presumably to aid the interpretation of the document. It is, however, not clear whether this is to apply only when the contract is not made for consideration, but is enforceable because of the presence of writing, or, whether it is to apply to all contracts in which there is in fact written evidence. If only the former is intended the already highly technical rules of evidence on this point will be rendered even more complicated, since it will be necessary to distinguish between contracts for valuable consideration but evidenced by writing, contracts not for valuable consideration but evidenced by writing, contracts subject to s. 40 of the Law of Property Act, and contracts under seal (unless the recommendations of Mr. Justice Goddard are accepted).

The Report and Comparative Law

It is useful to examine the Report in the light of comparative law since the Report itself frequently refers for support to other systems. The general tendency of the Report will be to assimilate English law with those systems which, like German law, require no set forms for the validity of contracts. French law, however, requires notarial form or private signature for non-commercial contracts of the value of 500 francs or more if the parties have not contracted out of this provision.[40] English law like German law[41] will continue to require writing for the sale of a few square feet of land, whereas sales of enormous quantities of goods will be valid and enforceable although not reduced to writing. It is of particular interest to English lawyers at this moment that German law makes an exception in the case of non-commercial contracts of guarantee, which must be in writing, for precisely those reasons mentioned in the minority Report.[42]

A good deal of attention has already been devoted to a comparison of *causa* and consideration. In French law *une cause licite* is one of the essential elements for the validity of a contract,

[40] Art. 1341 as amended by the law of April 1st, 1928.
[41] Art. 313 B.G.B.
[42] Art. 766 B.G.B.; Art. 350 H.G.B.

although it need not be expressed.[43] In German law the existence of *causa* is not necessary for the validity of a contract, but under certain circumstances the absence of *causa* gives rise to a claim for the recovery of money, chattels, land, services or any valuable asset which has passed under the contract. In German law *causa* has been defined as follows: "One may call the object which determines the legal significance of a shifting of value the legal object of this transfer of value."[44] "*Causa* is determined by the legal relations between the parties, not by the economic purpose of the performance."[45] It can at once be seen from this wherein *causa* differs most completely from consideration. If A owes money to B he may do so because he owes it to him, or because he wants to make a loan, or because he wishes to confer a gift. In practice the main differences have been the necessity for adequacy, at one time part of the doctrine of consideration, and those excrescences which have developed on the body of the doctrine and still exist. The disappearance of the necessity for adequacy instituted a process of assimilation which will be very considerably hastened by adoption of the Committee's present proposals for the abolition of these excrescences. The result of adoption of these recommendations will be that in oral promises English law will resemble French law, whereas in written contracts the position will be more closely analogous to that prevailing in German law.

Introduction of the *jus quaesitum tertio* will provide yet another similarity to French and German law, in both of which systems the *tertius* may acquire a right under the *res inter alios acta*.[46] The Report recommends that this right should be conferred only where it is expressly provided for in the contract. In German law, however, it may be conferred even though not expressly mentioned, if it can be gathered from the general circumstances of the contract, and in particular the object that was intended.[47] French law provides that the parties to a contract cannot revoke it if a third party has adopted a right conferred upon him by it[48], but in German law the right to revoke or cancel depends again on the general circumstances of the case and particularly the object of the contract.[49]

[43] Arts. 1108, 1131, 1132 C.C.
[44] v. Tuhr, *Allgemeiner Teil des Bürgerlichen Rechts*, vol. III, p. 63.
[45] See Art. 812 B.G.B.
[46] Arts. 1165, 1121 C.C. Arts. 328 to 335 B.G.B.
[47] Art. 328 B.G.B.
[48] Art. 1121 (2) C.C.
[49] Art. 328 B.G.B.

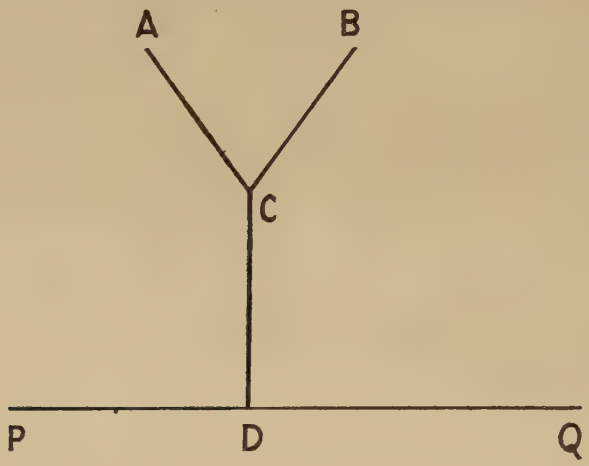
JUDICIAL PROCESS AT ITS WORST

WITH the coming into force of the Public Health Act, 1936, one of the most confused sections of Administrative Law passes into the realm of the forgotten with all the other "temporary past expedients." Yet before it completely disappears from our memory it will be useful to refer to it once more by way of funeral oration; for it exhibits at its worst the weakness of the relation between judiciary and legislature, a weakness which is common to all Anglo-Saxon systems owing to the excessive influence of common law methods of thought in the interpretation of modern legislation. For forty-six years administrative authorities have had to deal with a pressing social problem without knowing what the law was or, what is worse, knowing what it was and realising that it was ridiculous and futile.

In Victorian England, small houses were built in rows of what the estate agents called "desirable terrace villas." Even where, owing to the comparative prosperity of the skilled workers, houses were built in blocks of two semi-detached "villas," the same problem arose. For the sake of simplicity we may consider the block of small houses. We will exclude, too, the back-to-back houses which were a feature of the industrial towns of the north. Here again the problem was essentially the same, though slightly complicated by the fact that two blocks were, so to speak, stuck together, and the sanitary arrangements of the houses (if any) were made for blocks of four instead of blocks of two. In the ordinary row, which we are considering, the houses were and are drained either singly or in pairs by pipes running into a common pipe and thence into the main sewer. For most of the nineteenth century, if the sewage was carried off at all, it was drained into cesspools, but with the development of higher standards of public health (chiefly owing to cholera epidemics) and the creation of the general public health authorities, main sewerage systems became so common that it may now be said that all towns of any size have such systems, and that building byelaws compel private builders to connect up with the sewers maintained by the local authorities.

The simplest case is that of a main sewer running under the street or through the yards of the houses. To avoid expense, the builder of two houses may have decided not to connect each house directly with the main sewer, but to drain each house of a pair into a common pipe which passes the sewage into the main sewer. Thus, the pipes form a capital Y, rather like the following

sketch. A and B are the two houses. Each has a private drain meeting at C. A common pipe CD connects with the main sewer PQ which drains all the houses in the row. All these pipes are put in by the private builder, though in most towns the plans have to be approved by the local authority in accordance with building byelaws made under section 157 of the Public Health Act, 1875 (now superseded by section 61 of the Public Health Act, 1936), and the local surveyor watches to see that the plans



are followed. The question at issue relates to the maintenance of these pipes.

Assuming that PQ lies under the street and that many houses drain into it, there is something to be said for the view that the public, that is, the local authority, should be responsible for the maintenance of PQ: but clearly the other pipes are essentially part of the structure of the houses, and there is much to be said for the view that they should be maintained by the owners of the houses. In fact, if we take a less obvious case, where the lines mentioned are not pipes but paths, this has for long been the practice. If PQ were not a sewer but a road, and AC, BC and CD were paths giving access to the road, then AC and BC would be private paths. CD and PQ are technically "streets" within the meaning of section 4 of the Public Health Act, 1875. But the local authority can compel the owners of the houses to make up these streets to the standards prescribed by the local authority, and the authority can then take them over so as to make them highways repairable by the inhabitants at large. What in fact happens normally is that the authority takes over PQ but does not take over CD. Consequently, CD is repairable by

the owners jointly, and PQ by the "inhabitants at large," or in other words the local authority, but only after "adoption."

For reasons which need not now be investigated, this obvious and reasonable method was not followed in respect of sewers. For section 4 of the Public Health Act, 1875, distinguished between "drains" and "sewers" and defined them in rather a peculiar manner. A "drain" was "any drain used of and for the drainage of *one building only*, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed"; and accordingly "sewer" was defined to include "sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." We need not investigate the difficulties to which these definitions have given rise, because in our example it is quite clear that AC and BC are "drains" and CD and PQ are "sewers."

By section 13 of the Public Health Act, 1875, all sewers within the district of a local authority vested in that authority except—

(1) sewers made by any person for his own profit, or by any company for the profit of the shareholders;

(2) sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating land;

(3) sewers under the authority of any commissioners of sewers appointed by the Crown.

None of these exceptions need concern us except the first. In fact, the first exception does not really concern us; for it was held that "sewers made for profit" mean sewers from which the person making them draws a profit. A person makes no profit from draining houses unless he makes a charge for the use of the sewers.[1]

In consequence, any private builder could, by draining two or more houses into a single pipe, place upon the ratepayers the burden of maintaining that pipe in perpetuity. Very often these

[1] *Acton L.B.* v. *Batten* (1884), 28 Ch.D. 283; *Pinnock* v. *Waterworth* (1887), 51 J.P. 248; *Bonella* v. *Twickenham L.B.* (1887), 18 Q.B.D. 577; affd. 20 Q.B.D. 63; *Ferrand* v. *Hallas Land and Building Co.*, [1893] 2 Q.B. 135; and for a case where a voluntary sewage rate was paid, see *Minehead L.B.* v. *Luttrell*, [1894] 2 Ch. 178.

pipes were put in before the local authority had acquired control of building; and it is only comparatively recently that local authorities have been able to control drainage by means of building byelaws. Many local authorities therefore sought to get rid of the liability by local Acts of Parliament. In the end, a general power was provided by section 19 of the Public Health Acts Amendment Act, 1890. This section could be "adopted," that is, made applicable to any district, by the local authority of that district with the consent of the Local Government Board, or later, of the Minister of Health.

Section 19 was as follows—

> "(1) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expense incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction.
>
> (2) Such expenses may be recovered summarily or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly.
>
> (3) For the purposes of this section the expression "drain" includes a drain used for the drainage of more than one building."

Section 41 of the Act of 1875 thus incorporated provided that on complaint the local authority might investigate a nuisance and order the owner to execute the necessary works. If the owner failed to do so, the local authority might execute the works and recover the expenses from the owner.

The general purpose of this provision was clear enough. To go back to our diagram, if the houses A and B are in different ownership, then the pipe CD is to be regarded as a "single private drain," and the owners of A and B are to be made liable for the cost of any works necessary to abate a nuisance in the pipe. Probably, it was this simple case which the draughtsman had in mind; yet a little consideration shows that the case need not be so simple. In the first place, why did he insist that the houses must belong to separate owners? If the two houses belong to the same owner, the pipe CD is still a "sewer" and the cost of

maintaining or repairing it falls on the local authority. If separate owners of A and B are to be responsible for the cost of repairing defects, then logically a common owner of both ought also to be liable. Presumably the answer is that the draughtsman thought that the pipe was a drain and not a sewer. It is clear, however, that the courts could not say that "Parliament" had made a mistake and correct it by reading "belonging to different owners" as "whether belonging to different owners or not."

Again, what is the distinction sought to be drawn between a "single private drain" and a "public sewer"? Under the Act of 1875 what is referred to in the section of the Act of 1890 as a single private drain was in fact a sewer; and because it was a sewer it vested in the local authority and might therefore be described as "public." The pipe PQ, for instance, might be regarded as a single private drain; and so might any other sewer. If it was meant that a sewer was public if it was provided by the builders, then the draughtsmen should have said so; and in any case in most building developments not already along the line of a main sewer the builder himself provided the sewer, whether it passed through the curtilages of the houses, or under a private street (which was usually taken over by the local authority so as to become a highway repairable by the inhabitants at large), or with the consent of the local authority under an existing highway.

These two examples do not exhaust the difficulties. They are however, enough to show that the courts had no easy task when they were called upon to interpret the section, The drafting left much to be desired. Nevertheless, it was the task of the courts to find some solution. Moreover, a solution was required quickly. For the section was widely adopted, with the result that until some authoritative interpretation was given local authorities and owners of houses did not know the nature and extent of their obligations. It is the purpose of this essay to demonstrate how far the courts satisfied the task thus thrust upon them.

II

We must begin with *Travis* v. *Uttley*,[2] though it was a case to which the Act of 1890 did not apply. Three houses in the same ownership drained into one pipe which connected with a sewer. The owner was summoned for nuisance caused by the escape of sewage from the pipe. Section 19 was mentioned by counsel but not by the court, and it was rightly held that the pipe was a

[2] [1894] 1 Q.B. 233.

sewer for which the local authority and not the owner of the houses was responsible. Wright, J. thought it absurd that the Act of 1875 should "take away property" from the owner and that the local authority should have to repair it; but he considered that the statute was plain. It certainly was plain; and as to the absurdity of taking away property rights, it has to be remembered that this provision first occurred in the Public Health Act, 1848, and that property owners even in 1848 were always willing to give up property which involved more burden than profit; they did not give up the sewers from which they made a profit.

In *Self* v. *Hove Commissioners*[3] we find a drainage system similar to that in the plan. Here there were two houses (A and B) in different ownership, and the leg of the "Y" (the pipe CD) was defective. Section 19 was in force in the district, and the local authority served a notice upon one of the owners to repair the defect. He did so, and then sought to recover from the local authority on the ground that he had done work under their compulsion. Counsel said that section 19 did not apply to the district in *Travis* v. *Uttley*, but this assertion was stated in a footnote to the present report not to be true. Obviously, the reason for the court's paying no attention to section 19 in that case was that the three houses were in the same ownership. In the present case the court interpreted section 19 quite strictly and said that since the liability under the section was upon tne owners, no action lay. Wills J. for some reason unexplained went on to consider what would have been the position if section 19 had not applied; and Wright J., who had been one of the judges who decided *Travis* v. *Uttley* said that he would like to see that case considered by the Court of Appeal—though what the Court of Appeal could have done other than that which Wright J. himself had done, he did not explain.

In *Hill* v. *Hair*[4], several houses in different ownership drained into a brick drain and thence into a ditch, which had been converted into a sewer in 1853. An owner was served with a notice to abate a nuisance in the brick drain, and as he did not comply he was summoned. It was said by counsel that until *Travis* v. *Uttley* such drains were treated as private. This assertion simply was not true; the whole purpose of the local Act clauses which were generalised in section 19 of the Act of 1890 was to place the liability on the owners because the drains were being treated as sewers, as the Act of 1875 provided; possibly counsel was

[3] [1895] 1 Q.B. 685.
[4] [1895] 1 Q.B. 906.

presuming on the ignorance of the court. Certainly something misled the court; for it was held that on the passing of the Public Health Act, 1848, the brick drain became a sewer, and that neither a local Act in force in the district nor section 19 of the Act of 1890 converted such sewers into private drains. This was in flat contradiction to the decision in *Self* v. *Hove Commissioners*. The Law Journal report of that case[5] was quoted to show that there the two houses were within the same curtilage. What difference that made was not explained. If a drain common to two houses within the same curtilage can be a drain and not a sewer (a question still not decided[6]), it is because the two houses are two buildings within the same curtilage, so that the pipe is a drain within the meaning of section 4 of the Public Health Act, 1875, whereas the case was decided under section 19 of the Act of 1890. In any case, Channell Q. C., who was counsel in both cases, stated that the report was wrong, as it obviously must have been. Cave J. went on to say that if the two houses were not within the same curtilage he did not understand the observations of Wills J. With this remark some sympathy must be felt; for as Wills J. decided the earlier case on the basis of section 19, there was no reason for him to consider what would have been the situation if that section had not applied. Finally, Cave J. suggested that perhaps section 19 was passed because there are drains draining two or more houses which are not sewers. This referred primarily to drains made for profit; but the liability to maintain such drains is vested in the owner because it was not transferred by section 13 of the Public Health Act, 1875. Consequently, section 19 did not apply and was not intended to apply to such drains.

The result was a direct contradiction between *Self* v. *Hove Commissioners* and *Hill* v. *Hair*. Accordingly, it became necessary for the courts to clear up the confusion. In *Bradford* v. *Eastbourne Corporation*,[7] six houses were drained by a common pipe running in private property until it met a road, where it joined a sewer. There being a nuisance in this common pipe, notice was served upon the separate owners of the houses. They failed to obey, the local authority did the work, and sought to recover the cost from the owners. The appellant, one of the owners, contested liability. Lord Russell of Killowen C. J. reconsidered the whole branch of the law. In *Travis* v. *Uttley*, he said, the houses belonged to one owner, so that section 19 of the Act of 1890 did not

[5] 64 L.J.Q.B. 217 at p. 218.
[6] See the remarks of Lord Alverstone in *Harris* v. *Scurfield* (1904), 68 J.P. 516.
[7] [1896] 2 Q.B. 205.

apply. In *Self* v. *Hove Commissioners*, on the other hand, the houses belonged to different owners, so that section 19 did apply. The difficulty that a single private drain under the Act of 1890 was a sewer under the Act of 1875 was met by the assertion that the Act of 1890 for the purposes of section 19, and for those purposes only, widened the definition of drain in section 4 of the Act of 1875. The pipe vested in the local authority as a sewer, but the liability to repair this sewer was transferred to the owners by section 19 of the Act of 1890. A "private drain" means "a drain originally constructed for the drainage of one or more houses, as distinct from a drain or sewer which any member of the public may have a right to use by connecting with it the drain from his own house." (This is certainly too wide. Any person had the right to connect his drain with any sewer, though of course he had no right to trespass for the purpose. For instance, if the common pipe from the houses of A and B passed through X's property, any other person could by arrangement with X connect his house with the pipe under section 21 of the Public Health Act, 1875, providing that he satisfied the conditions of that section as to notice to the local authority, etc., for the pipe was a sewer.) Accordingly, *Self* v. *Hove Commissioners* was followed in preference to *Hill* v. *Hair*. Wills J. agreed. The pipe was a sewer but was a private drain for the purposes of section 19. "A public sewer is obviously meant here to indicate a sewer which serves the public generally, and has or may have an indefinite number of houses connected with it, either directly or because branch sewers come into it; whereas the 'private drain' serving two or more houses is that of which the natural use is confined to those houses, and with which other houses belonging to other owners could not be connected without the consent of the persons through whose land it runs." (But, on this basis a public sewer might run through private property, so that connections could not be made with it without the consent of a person through whose property the sewer ran.) He had looked up the file of *Travis* v. *Uttley*, and it was clearly a case in which the two houses belonged to the same owner; but he admitted that a passage in his judgment in that case was erroneous.

So in 1897 the position was that the two Divisional Courts had given one interpretation and a third had given another. But lest the application of the statute be made too easy for local authorities, another Divisional Court proceeded in *R.* v. *Hastings Corporation*[8] to find a further difficulty. Section 19 of the Act

[8] [1897] 1 Q.B. 46.

of 1890 incorporated section 41 of the Act of 1875. That section provided—

> "On the written application of any person to a local authority, stating that any drain . . . on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise), the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without such notice, to enter such premises, with or without assistants, and cause the ground to be opened, and examine such drain . . . . If the drain . . . shall appear to be in bad condition or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty . . . and the local authority may, if they think fit execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses."

In the present case, a mandamus was sought to compel the local authority to repair a drain which took the drainage of several houses, on the ground that it was a sewer which they were liable to repair under section 13 of the Act of 1875. A mandamus was granted. Grantham J. said that *Bradford* v. *Eastbourne Corporation* did not apply, because section 41 of the Act of 1875 was applicable only "on the written application of of any person to a local authority," and here there was no such application.

On this basis, section 19 meant only that if some person complained, then, presumably, the local authority had to cause the drain to be inspected, and if then it was found that the drain was defective, the authority could serve notice upon the owners, and, in default, do the work at their expense. But if no such complaint was made, even where the drain was obviously defective the local authority was under a statutory duty to maintain. Wright J., while agreeing that the liability was upon the local authority, doubted whether mandamus was available as a remedy. A later decision of the House of Lords[9] showed that the remedy for breaches of duty under this Part of the Act of 1875 was an

[9] *Pasmore* v. *Oswaldtwistle U.D.C.*, [1898] A.C. 387.

application to the Local Government Board and not mandamus. *R.* v. *Hastings Corporation* was thus overruled; but the decision stood in so far as it implied that the duty was upon the local authority and not upon the owners. It is to be noted, also, that Wright J. quoted *Hill* v. *Hair* with approval and seemed to assume that all the previous decisions were valid. In *Seal* v. *Merthyr Tydfil U.D.C.*,[10] however, *Bradford* v. *Eastbourne Corporation* was followed and *Hill* v. *Hair* was not followed by Cave J., who had been one of the court which decided the latter case.

Lancaster v. *Barnes U.D.C.*[11] was an opportunity to create further confusion. Here the common pipe drained five houses, three of which were in one ownership and the others in another. The opportunity was not taken, and it was held that a notice to repair by the local authority was valid, though neither owner could relay the pipe without the consent of the other. With *Thompson* v. *Eccles Corporation*[12], however, we go back to *Hill* v. *Hair*. Complaint was made that the defendant had failed to comply with a notice under section 19 of the Act of 1890 and section 41 of the Act of 1875. He owned seven houses which drained into a nine-inch pipe running through and under the cellars. This was a continuation of a six-inch pipe which passed through and under two other sets of houses. The blocks of houses were separated only by private passages, so that neither pipe ran under a road. Lord Alverstone C. J. began by expressing the hope that "the Court of Appeal or the House of Lords may be able, by sweeping away some of the conflicting decisions upon this subject, to reduce the law to a logical system, or else that Act of 1890 may be amended, by the insertion of a definition of the expression 'single private drain'." He then said that the nine-inch pipe was a sewer under the Act of 1875, that the decision in *Bradford* v. *Eastbourne Corporation* was "absurd and ridiculous," that Parliament did not intend that the question of liability should depend on whether the houses were in the same or in different ownership, and that the liability was upon the local authority. Darling J. found himself unable to come to a conclusion, and left the decision to Channell J. The last-named, who had had considerable experience in this branch of the law, said that "belonging to different owners" meant "not all belonging to the same owner," but nevertheless followed *Hill* v. *Hair*.

This decision was followed almost immediately by a remarkable

[10] [1897] 1 Q.B. 543.
[11] [1898] 1 Q.B. 855.
[12] [1904] 2 K.B. 1.

case before Channell J. alone. In *Haedicke* v. *Friern Barnet U.D.C.*,[13] the facts were much the same. Four houses in one ownership and sixteen houses belonging to other owners drained into a single pipe on private ground. A nuisance notice was issued under section 94 of the Act of 1875. The plaintiff did the work under protest and sought to recover the cost from the local authority. Channell J. decided that a promise to pay was implied and that the duty to repair was on the local authority apart from section 19. The question, therefore, was as to the effect of section 19. He now examined the cases again—or, rather, examined them for the first time; for he made the remarkable admission that in *Thompson* v. *Eccles Corporation* the court did not have before it the full report in *Bradford* v. *Eastbourne Corporation*. He still thought that the section was intended to apply to drains which were not sewers, but admitted that this view was not in accordance with the Eastbourne case. Accordingly, he held that if the local authority had proceeded under section 41 the plaintiff could not have recovered. Since the proceedings had been under section 94, the plaintiff could recover, following the principle of *R.* v. *Hastings Corporation*.

Confusion being thus made worse confounded, both authorities appealed to the Court of Appeal, which took the two cases together.[14] Exactly how *Thompson* v. *Eccles Corporation* got to the Court of Appeal is a matter of conjecture. It originated in an application for a penalty under section 41 of the Act of 1875, but the justices in fact made an order (which in all probability they had no power to make) under section 96 of the Act, the effect of the order being to compel the defendant to do the work. In either case, the question was a "criminal cause or matter" over which the Court of Appeal had no jurisdiction.[15] One commentator therefore suggested "that the appeal was heard—as according to Channell J. the case in the Divisional Court was decided—by inadvertence."[16] However, the case was heard, and it was held that the decision in *Bradford* v. *Eastbourne Corporation* was correct. *Hill* v. *Hair* was accordingly overruled at last. The Court also reversed the decision in the *Friern Barnet* case. The obligation as between the owner and the local authority was by section 19 placed on the owner. The decision of Channell J. was based on a technicality and "we ought not to strain after these technicalities." Since the burden of repair was upon the

[13] [1904] 2 K.B. 807,
[14] [1905] 1 K.B. 110.
[15] Proceedings under the niusance clauses, which include section 96, had been held to be criminal : *R.* v. *Whitchurch* (1881), 7 Q.B.D. 534, and other cases.
[16] See the note in 3 L.G.R. at p. 39.

plaintiff, she was debarred from saying that the work was done at the request of the local authority and on its behalf.

In the meantime, the Divisional Court had dealt with another case. In *Jackson* v. *Wimbledon U.D.C.*[17] a drain common to sixteen houses in a terrace, numbered 51 to 81 (odd numbers only), inclusive, was found to be defective. The twelve houses numbered 51 to 73 (odd numbers), inclusive, belonged to the appellant. No. 75 belonged to another owner, and numbers 77 to 81 belonged to a third owner. This drain was connected with the main sewer by a pipe running between numbers 73 and 75. Thus, the houses belonging to the appellant were on the one side of this communication pipe, and the houses belonging to other owners were on the other side. In other words, the pipe which ran through the appellant's property drained twelve houses in the same ownership; the sewage then passed into a pipe which took the drainage of four other houses which did not belong to the appellant. The local authority took the steps prescribed by section 41 of the Act of 1875, and as the appellant failed to do his part of the work, they sought to recover the cost from him. The appellant contended that the pipe which drained his houses only was not within section 19 because all the houses were in the same ownership; and the Divisional Court agreed with him. This Divisional Court included Lord Alverstone C. J., who also presided over *Thompson* v. *Eccles Corporation* three weeks later, but also included Wills J., who had been a member of the court which decided *Bradford* v. *Eastbourne Corporation*. Perhaps for this reason Lord Alverstone said that the *Eastbourne* case had been of great assistance, though in the *Eccles* case three weeks later he said that that decision produced a conclusion which was "absurd and ridiculous." However, the only question in the present case was whether a part of a pipe which drained houses in the same ownership came within section 19; and it was held that it did not. The Court of Appeal affirmed this decision after their decision in the *Eccles* and *Friern Barnet* cases.[18] The effect of the decision was to hold that part of a single pipe was a single private drain, while another part was a sewer and not a single private drain; this composite pipe was connected with a sewer by another single private drain.

Obviously this raised all sorts of questions. For instance, if a pipe first drained three houses belonging to A and then three houses belonging to B, it was not a single private drain under A's houses, but was a single private drain under B's houses.

[17] [1904] 2 K.B. 359.
[18] [1905] 2 K.B. 27.

Again, any sewer must begin somewhere. So long as it took the drainage from houses owned by one person, it was, apparently, a sewer, but after that did it remain a sewer or did it become a single private drain? An even more complicated problem was created by *Wood Green U.D.C.* v. *Joseph*.[19] There a terrace of houses was drained in pairs, each pair having a drainage system on the familiar "Y" principle explained at the beginning of this essay. The feet of the Y's were joined by a single pipe (i.e. the pipe PQ in our sketch) in private ground. Joseph owned three pairs of the houses, and it was therefore obvious that the legs of the Ys (i.e. the pipes similar to CD in our sketch) were in his case sewers and not single private drains. The council contended, however, that since the drainage of the other houses of the terrace, owned by different persons, passed into the pipe PQ, that pipe was a single private drain, and called upon all the owners to repair the pipe. The owners defaulting, the council did the work and sought to recover the cost from the owners. Joseph refused to pay his share, contending in the first place that the original complaint had come from the council's own surveyor of nuisances, so that there was no complaint under section 41, and in the second place that the pipe did not connect his houses with the public sewer, but connected a sewer (i.e. the pipe CD) with the public sewer, and so was not within section 19.

The Divisional Court rejected the first contention but upheld the second. Lord Alverstone C. J. gave the judgment of the Court, and said that "when we get sewers communicating with a pipe, or, in other words, a pipe receiving the drainage of several sewers, it does require some good reason or legal ground for saying that the pipe which the sewers go into is not a sewer." It is possible that this had been the situation in *Bradford* v. *Eastbourne Corporation*; but as nobody regarded the question as important in 1896, the report does not state whether the houses were drained separately or in pairs, or if they were in pairs, whether there was a common owner to one pair. Nor were these facts mentioned in *Thompson* v. *Eccles Corporation*. There the report rather suggests that the pipe in question received the drainage of two blocks of houses first, and that the houses in each block were in the same ownership. If this was so, the six-inch pipe in that case was a sewer, and it seems to follow that the nine-inch pipe which was the subject of the case was a sewer, for all the houses draining directly into the nine-inch pipe were in the same ownership. In other words, the Divisional Court found reasons to distinguish this case from those cases by assuming facts that were not stated

[19] (1905) 3 L.G.R. 1147.

in the previous cases because nobody thought that they mattered. Again, the whole assumption of the decision in *Jackson* v. *Wimbledon U.D.C.*, was that two pipes drained into a single private drain. One of these was held to be a sewer; therefore the common pipe could not, under the present decision, be a single private drain. In other words, *Jackson's* case was decided by Lord Alverstone C. J. and his colleagues on completely false assumptions.

Naturally, the local authority took *Joseph's* case to the Court of Appeal.[20] That Court apparently thought that the simplest plan was to look at none of the cases and to read section 19 instead. The section applies "where two or more houses belonging to different owners are connected with a public sewer by a single private drain." Were these houses connected with a public sewer by a single private drain? No, said the Court. The pipe connected a sewer with a sewer. That statement was of course true; but then houses are rarely connected directly with the public sewer by a single private drain. Each house has its own drain, so that the houses are connected with the public sewer by a drain, and a conduit which may be described as a sewer or a single private drain according as one reads the cases. The assumption in *Jackson* v. *Wimbledon U.D.C.* was that houses could be connected by drains, a sewer, and a single private drain.

Again the Wood Green Council were not satisfied, and for the first time the House of Lords was asked to give assistance.[21] Lord Ashbourne thought that both the Divisional Court and the Court of Appeal were right. However, the rest of the House affirmed the decision on a ground which had nothing whatever to do with the previous cases, which had never been mentioned in any of the earlier judgments, and which apparently had not been put by counsel in any of the arguments. They said in effect that section 19 applied section 41 of the Act of 1875. Section 41 prescribed the machinery by which owners may be compelled to discharge the obligation in section 40 to keep drains in repair. These sections form part of a group of sections giving powers to local authorities as to the drainage of houses. They refer, therefore, to drains which the local authority had compelled the owners to provide. That is, section 19 applied only where the local authority had compelled the owner of an undrained house to put in drains under section 23 of the Act of 1875, or to new houses in urban districts, as to which the local authority had power to compel drainage under section 25 of that Act. As the

[20] [1907] 1 K.B. 182.
[21] [1908] A.C. 419.

pipe in question did not appear to have been so provided (though nobody had given evidence on this point because nobody until then had suggested that it was material), it was a sewer and not a single private drain. This settled matters; but in order not to leave the Court of Appeal decision standing so far as drains under sections 23 and 25 were concerned, it was decided that the pipe did connect the houses with the public sewer, and that the Court of Appeal was wrong on this point.

So, eighteen years after the Act of 1890 was passed, it was held that section 19 did not apply to most of the situations to which everybody thought it applied, and that all the previous litigation had proceeded on completely false assumptions. It should be added that the limitation of the section to houses provided under sections 23 and 25 had an even more restrictive effect than appears on the surface; because for many years local authorities in many parts of the country had made separate agreements whenever a builder wanted to connect houses with the local authority's sewers. Under those agreements the owner covenanted to repair the common pipes, whether they were or were not sewers. Generally speaking, section 19 was required for old houses; and it was exactly to these houses that the House of Lords refused to apply it.

There is little more to be said, for the House of Lords had in effect torpedoed the section. *Kingston-upon-Hull Corporation* v. *North-Eastern Railway Co.*,[22] was a case under a local Act. The Corporation had realised in 1903 that section 19 of the Act of 1890 gave more trouble than it was worth, and like many other local authorities they had secured the repeal of the section, so far as it applied to their district, and the substitution of a section which made no difference between houses in different ownership and in the same ownership. Naturally they could not in 1903 provide against the rule laid down by the House of Lords in *Wood Green U.D.C.* v. *Joseph* in 1908, but the houses in question were provided with drains under section 23 of the Act of 1875, so that no difficulty arose on that ground. The interest of the decision is that the whole case turned on the question whether a cul-de-sac had or had not been dedicated to the public. It was held that it had not, and that in any case the common drain to all the houses was a "single private drain" and not a "public sewer."

The Courts rendered their swan-song on this subject in *Hill* v. *Aldershot Corporation*.[23] It was a case which would have been regarded as perfectly simple between 1896 and 1908 (assuming

[22] [1916] 1 Ch. 31.
[23] [1933] 1 K.B. 259.

that *Hill* v. *Hair* was disregarded as being nonsense, as it was). Here were fifteen houses in a row, each drained by a single pipe into a common pipe which we will call XY, and thence into a public sewer under the highway. The three houses at the beginning of XY were owned by the appellants, and the rest by different owners. The question was whether XY was a single private drain, and the case went to the Court of Appeal.

A new generation of judges was called upon to unravel a tangle of case law. One of them did not mince his words. Scrutton L.J. said:

> "If I had a free hand to construe the statutes without reference to the decisions I should probably have arrived at a different conclusion from that which I have with some difficulty reached. Such a decision would no doubt be welcomed by various non-judicial writers who have protested against too careful adherence to the principle known as *stare decisis*, following decisions of co-ordinate and superior courts, though one does not agree with them. But, in my view, liberty to decide each case as one thinks right without regard to principles laid down in previous similar cases would only result in a completely uncertain law, in which no citizen would know his rights or liabilities until he knew before what judge his case would come, and could guess what view that judge would take on a consideration of the matter without any regard to previous decisions. . . .The statutes being difficult to work, the decisions on particular facts are chaotic and contradictory to a degree."

He then considered *Bradford* v. *Eastbourne Corporation*, the *Eccles* and *Friern Barnet* cases, and finally the *Wood Green* case. As to the distinctions made by Lord Alverstone in the Divisional Court in that case, he said that they were distinctions "which I have not been fortunate enough to understand; I think the real truth is he did not like the decisions, he thought they led to unreasonable results, and he declined to follow the Court of Appeal." As to the main point of the decision of the House of Lords in that case, "I have great difficulty in following the decision. If Mr. Glen, one of the counsel in the case, is correct in stating, as he does in his work on Public Health . . . that it 'was based on a ground which had not been mentioned by any of the Courts below, or in the arguments of either of the parties at any stage of the case,' my difficulty is intelligible." He thought, "with respect," that the intention of section 19 was the opposite of that stated by the House of Lords. However, he had to follow

it, and decided with some doubt that it meant that a pipe on private land draining six houses in different ownership is a single private drain, but that if two of the houses are owned by the same person it is a sewer repairable by the local authority. "This, with all respect to the Legislature, or those who so decided, seems to be an absurd result."

Lawrence L.J. examined even more of the cases before he came to the House of Lords decision and confessed to having found it difficult completely to follow the reasoning of the House of Lords. In particular, he refers to one passage in the majority judgment which "had overlooked the fact that section 19 of the Act of 1890 does not apply to houses drained into cesspools," though the judgment laid stress on the fact. The present case as stated to the court apparently ignored the decision of the House of Lords, for it did not show whether the houses had been provided under sections 23 and 25 or not. He did not appreciate why sections 23 and 25 had anything to do with it, but according to the House of Lords they did. Accordingly, he agreed that on the facts as stated the pipe was not a single private drain. Greer L.J. did not attempt to deal with the cases. He decided simply on the ground that it was not shown that the pipe was inserted in accordance with section 23 or section 25. "This view of the case relieves me of the very difficult task of trying to harmonise the various decisions of the Divisional Courts and the Court of Appeal on this debatable question, and, if they are incapable of being harmonised, of pointing out which of them are right and which of them are wrong—a difficult task, which my brethen have essayed with great diligence, but, as I read their judgments, with negative results."

So, *Hill* v. *Aldershot Corporation* brought the matter no further forward. One point only was clear, that the section did not apply unless the pipe was put in at the order of the local authority under section 23 or section 25 of the Act of 1875. The opportunity for changing the law came in 1936. The Local Government and Public Health Consolidation Committee[24] recommended the complete abandonment of the rule that a sewer vests automatically in the local authority. The Public Health Act, 1936, has given effect to this recommendation. Existing sewers become "public sewers," and in future sewers will not vest until after a declaration of vesting by the local authority. In the absence of such a declaration they will be "private sewers" repairable by the owners. In certain cases of old sewers, the local authority can recover the cost of maintenance from the owners;

[24] Second Interim Report (Cmd. 5059 1935) pp. 26–32.

but the language of section 19 of the Act of 1890 is not repeated, and in effect the Act reverses the decision in the *Wood Green* and *Aldershot* cases. The Report does not say that those cases were wrongly decided, but remarks, "we have attempted to draft the clause so as to give effect to the view which we think . . . the legislature may fairly be presumed to have accepted."[25]—which is in substance to say that the courts have given effect to a view which Parliament did not intend.

III

In drawing conclusions let us not forget that the clause was badly drafted. It must however be remembered in defence of the draftsman that the law of Public Health grew up gradually as public opinion overbore the vested interests of property owners. Only a cholera epidemic enabled reformers like Sir Edwin Chadwick to persuade Parliament that *laissez-faire* did not mean that property owners could kill thousands of their fellow-men by polluting the water that they drank and the air that they breathed. Only another cholera epidemic produced the great Royal Sanitary Commission of 1869 to 1871 and pushed through under a Conservative Government the legislation which was consolidated in the Act of 1875. Much of the legislation was therefore a compromise and in consequence obscure. Moreover, the great laboratory of public health legislation was not in Parliament or in Whitehall; it was in the towns, where local reformers, mostly Radicals, induced the electorate to realise that public health means life. The work done by the Radical mayor of Birmingham, Joseph Chamberlain, is known to history because Chamberlain became an imperialist politician. But Chamberlain came late in the day. He saw that local authorities must supply water as they supplied sewers. The real reformers were those who saw that local authorities must provide sewers and control drains. Large parts of the general Public Health Acts were based on local clauses drafted by obscure town clerks. Section 19 of the Act of 1890 was one of those parts.

The idea behind section 19 was simple. The chief blame for the absurdities of the case law summarised in this article must rest on the judicial system. Whatever be the difficulty of the interpretation, it is the duty of the courts to find a meaning which accords with the general idea of Parliament, to express in concrete decisions the "intention of Parliament." In such a

[25] Cmd. 5059, p. 31.

problem as that which we are discussing, a determination is required quickly. Drains and sewers are always producing defects. A single crack in a single sewer may cause the death of a hundred and the illness of a thousand. It is therefore necessary that people should know upon whom is to fall the cost. It was clear in 1890 that the cost of repairing a drain fell upon the owner. It was the intention of Parliament that where houses in different ownership drained into a single private drain connecting the houses with a public sewer, the cost should again fall upon the owner. It was therefore the intention of Parliament that in other cases the cost should fall upon the local authority. The dividing line was not clear, and it was the business of the courts to draw it as quickly and as definitely as was possible. An ideal solution of a badly drafted statute is not to be expected . In any case, people cannot hold up their sewage for a hundred years while the judges go searching ideals through a maze of analogies, distinctions, inferences and deductions. Human physiology knows nothing of the antiquity of the common law. Sir William Holdsworth says that the case system "hits the golden mean between too much flexibility and too much rigidity, for it gives to the legal system the rigidity which it must have if it is to possess a definite body of principles, and the flexibility which it must have if it is to adapt itself to the needs of a changing society."[26] If those responsible for public health law waited for the courts to hit the golden mean society would certainly change, and we should all be rigid.

The interpretative function is essential; rigidity is given by the statutes, to which the courts are expected to pay some attention. *Stare decisis* in the interpretation of statutes is useful if the courts set out to explain how the statutes are to be applied to individual situations of particular classes, if they keep constantly before them what the statute is intended to do, and, above all, if they come to conclusions quickly.

In the series of cases considered above, the courts were very quickly asked to interpret the law. They began with a reasonable decision. But in the same year another court came to the opposite conclusion. This involved a further case in which a choice had to be made between two conflicting decisions, and the court was still near enough to the statute to decide the question intelligently. In the following year the same question came up in a slightly different way and received a contradictory decision, but another case in the same year came back to the section once more. That settled the matter for five years; but then two contradictory

[26] "Case Law," 50 Law Quarterly Review, 193.

decisions were taken, in one of which the court could not be bothered to read what had become the leading case. These cases went to the Court of Appeal, though it is impossible to explain the legal interpretation by which one of them got there. In the meantime another aspect of the same problem had been decided, and there were now three Court of Appeal decisions, fifteen years after the original enactment, which appeared to give an intelligible meaning to the section. This result had been achieved by the co-operation (if the word can be used) of ten superior courts, not to mention the inferior courts.

However, the courts had not yet hit the golden mean, and in particular the last of the decisions had raised more problems than it solved. The next step was to find difficulties which nobody had assumed to exist, and which therefore had not been mentioned in the previous reports, but which made nonsense of those previous decisions. So we get a magnificent example of that process of "distinction" to which attention has recently been drawn. This is not the place to discuss it, but this particular example appears to follow common form. The process of law is a process of generalisation. In order to generalise it is necessary to omit certain facts as irrelevant. These facts are not mentioned in the reports. Accordingly, a later court can generalise in a different way—can, so to speak, shuffle its cards differently. The result is that new kinds of facts become relevant, and a case which is precisely the same on the former "relevant facts" becomes completely different because different "relevant facts" are selected. In a later case a lord justice suggested that the reason for the distinction was that the particular judge who made the distinction made it because he did not like the early decisions—the kind of statement which is rarely found outside the American legal periodicals. If judges begin to "distinguish" because they do not like decisions, where stands *stare decisis*? However, the Court of Appeal found a different reason for agreeing with the decision in this case. Then at last the views of the most learned lawyers were sought—eighteen years after the enactment of the statute—and they decided the case on an argument which had not been mentioned by counsel or judge in any previous case, which had not been put before them by counsel, which was quite contrary to the views of the hundreds of experts who had had to put the statute into force, which was clearly not desired by the local authorities, which later judges said that they could not understand, and which any unbiased person who had studied the subject would say, with Lord Justice Scrutton, was exactly the opposite of what Parliament had intended. By this time, of

course, the original idea of the statute had been completely forgotten by the courts.

The result was completely to destroy the efficacy of the section. It applied within such narrow limits (though indeed nobody knew how it applied within those limits) that for the most part it was ignored. The problem received a solution in most places either by local Acts which restored the original intention, or by covenants by which liabilities were settled by agreement. Finally, after a war or so, a few depressions, a vast amount of social legislation, and a long period of experimentation, Parliament has quietly tried to express again and in different words the intention that it had forty-six years ago. If the draughtsman was a Yorkshireman he probably said, as he penned the appropriate section, "Na' then, make a mook o' thaat."

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THE INCIDENCE OF JURY TRIAL DURING THE PAST CENTURY

A GLANCE at the *Index to Legal Periodicals* shows that attacks upon and defence of the jury system are frequent themes for legal writers. Any such discussion should have as a basis something more precise than a general statement about the declining use for juries, for unless a decline is stated quantitatively it conveys very little meaning. This paper is in essence an analysis of statistics, its purpose being to show the incidence of jury trial quantitatively. Legislation and Rules of Court bearing upon jury trial are dealt with, but, for reasons given later, no attempt is made to evaluate modes of trial.

As for the material, some criminal statistics can be found in the Parliamentary Papers of the early nineteenth century, but the system of judicial statistics came into operation in 1858 with an annual publication of both criminal and civil figures.[1] The method of compiling criminal statistics was revised and a new series begun for the year 1892; the comparative tables were revised and carried back to 1874; a revised system of civil statistics commenced in 1894. The revised system was excellent. During the war some small economy was effected, but the tables were substantially in the old form. In 1922 a complete change occurred. The civil statistics, published separately, were reduced to a meagre size: this contemptible economy has continued, and from 1922 onwards we have little more than an annual pamphlet. The information given in the current civil statistics is quite inadequate for any serious study of our legal system. The criminal statistics appear better, but I have not used them intensively and may be mistaken. All statistical data in this paper have been extracted from the official statistics or have been calculated from that material. Gaps in the graph are due to lack of figures for the years omitted.

Criminal Cases

In the earlier part of the nineteenth century criminal offences in England could be classified as (1) Indictable offences, triable before a jury at Assizes or Quarter Sessions,[2] and (2) Non-indictable offences triable before justices of the peace sitting

[1] They have been published as Parliamentary Papers, except 1914 (Part II), 1915, 1916, 1920 and 1921 which were published by the Stationery Office as non-Parliamentary Papers.

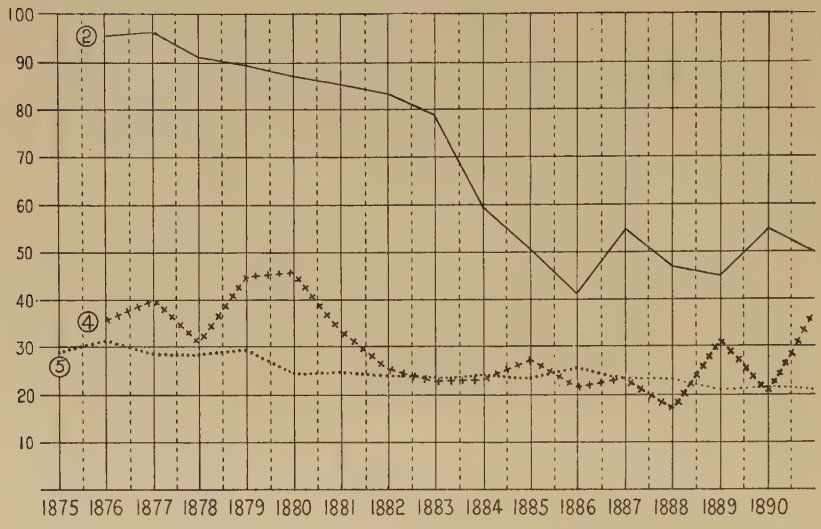
[2] The Old Bailey, or Central Criminal Court, is included in these terms, as it is the Assize Court for the London Area and Quarter Sessions for the City of London. The original criminal jurisdiction of the King's Bench and of the House of Lords is numerically unimportant.

without a jury. Thus when a statute of 1827 (7 & 8 Geo. IV, c.29) recast our law of larceny and allied offences, the more serious offences were indictable but jurisdiction over some less serious offences was given to justices of the peace to exercise in a summary manner. For this summary jurisdiction the justices of the peace had no definite court, and the statute had to lay down the manner in which the jurisdiction was to be exercised. Since that time a great change has come about. As a result of the Summary Jurisdiction Act, 1848, and subsequent statutes, the summary jurisdiction of the justices of the peace has become a regular procedure in courts of Petty Sessions.[3] This reorganisation of the duties of the justices of the peace has led to a vast increase in their jurisdiction. Criminal offences can now be classified as : (1) Indictable offences which must be tried on indictment before a jury; (2) Indictable offences which can be tried either on indictment or summarily in Petty Sessions; (3) Summary offences in which the accused can demand trial on indictment; (4) Summary offences triable only in Petty Sessions.

Group (3) requires little mention: it is provided by the Summary Jurisdiction Act, 1879, that in any summary offence (other than assault) punishable by more than three months' imprisonment the accused can, before the charge is gone into, demand to be tried on indictment; if accused exercises this option, then Petty Sessions cannot determine the matter but must treat the case as a preliminary inquiry to see if the case should be sent for trial on indictment.

The significant change is group (2), for it is the increase in the number of indictable offences tried summarily in Petty Sessions that has resulted in a decrease in the use of juries in criminal matters. The first inroad upon the old rule that an indictable offence necessarily means jury trial was made in the case of young offenders. In 1847 (10 & 11 Vict. c.82) it was provided that simple larceny and offences punishable as simple larceny by offenders under 14 years old should be tried summarily if the justices of the peace saw fit and the parent or guardian of the child consented. In 1850 (13 & 14 Vict. c.37) the age was raised to 16. For adults the change begins with the Criminal Justice Act, 1855, providing that simple larceny not over five shillings, or attempted larceny from the person or attempted simple larceny, should be triable in Petty Sessions if the justices of the peace saw fit and the accused consented. In other offences of the larceny group Petty Sessions was given power to sentence at once if the accused pleaded guilty. This legislation produced

[3] This expression is used here to include the Metropolitan Police Courts.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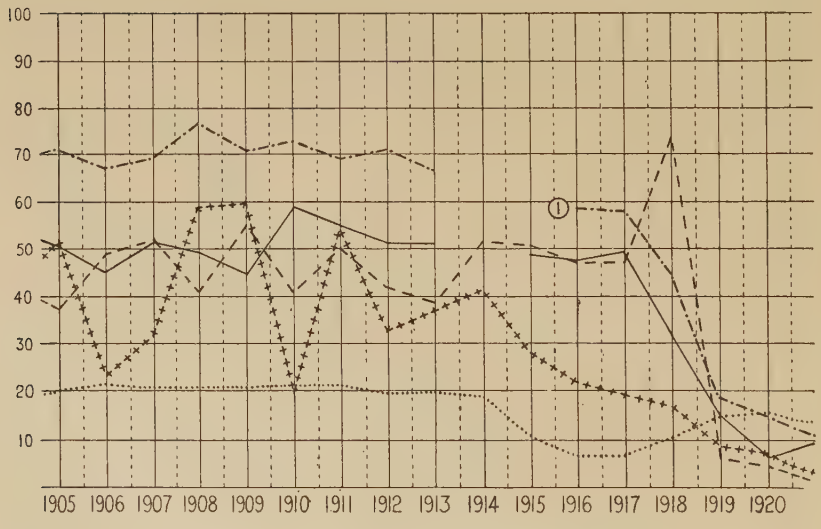
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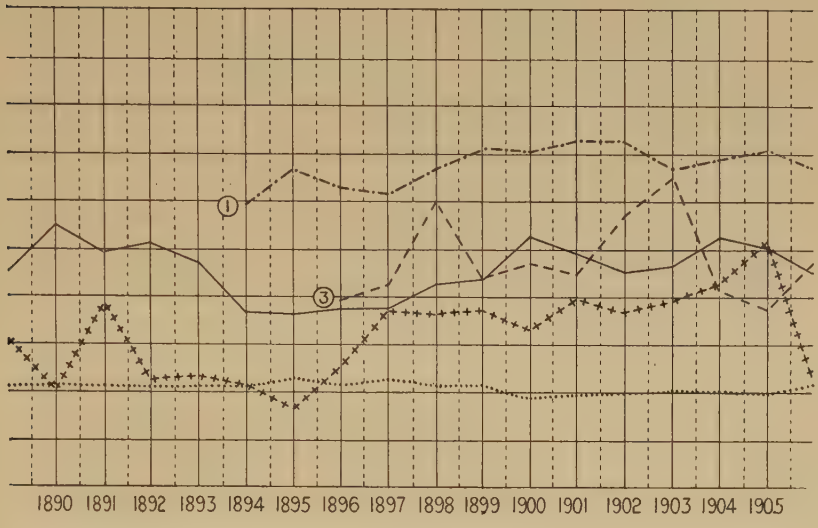
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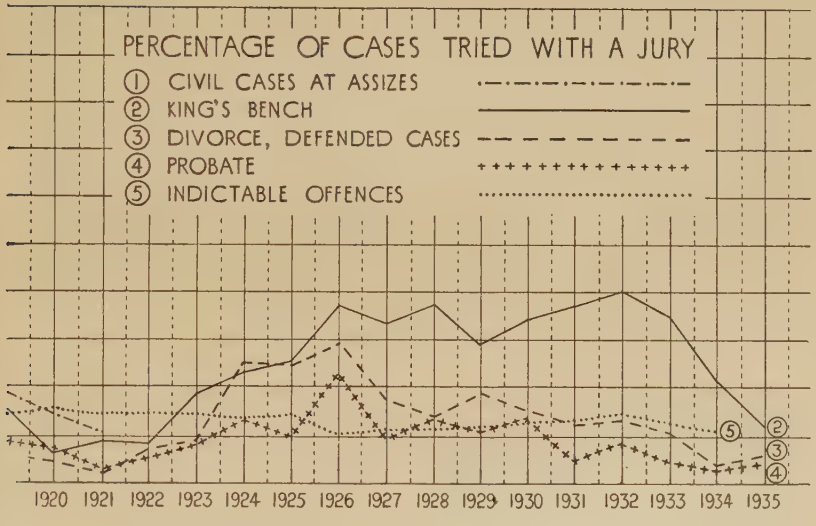
PERCENTAGE OF CASES TRIED WITH A JURY
① CIVIL CASES AT ASSIZES
② KING'S BENCH
③ DIVORCE, DEFENDED CASES
④ PROBATE
⑤ INDICTABLE OFFENCES
1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935

a drastic drop in the number of trials on indictment; in 1854 trials on indictment numbered 29,359, whilst for 1856 the figure was 19,437.[4] Comparing the average of the five years preceding the year of the statute with the five years following, the decrease amounted to 34·9 per cent. The corresponding increase in the work of Petty Sessions cannot be stated, since reliable statistics of Petty Sessions were not then kept.

The results were considered satisfactory, and this policy was extended by the Summary Jurisdiction Act, 1879. Subject to the safeguard that the justices of the peace must see fit and the accused (or his parent or guardian in the case of a young child) consents, summary trial might be used for a child under 12 for any offence other than homicide, for offenders between 12 and 16 for a wide variety of offences set out in a schedule, and for adults charged with larceny and allied offences where the subject matter did not exceed 40s. in value. The result was a further decline in the number of trials on indictment. Taking again the annual average for five years preceding and following this legislation, trials on indictment decreased by 1,116 a year, a decrease of 7 per cent. Reliable statistics of Petty Sessions are available for this period, and these show an increase of indictable offences tried summarily of 8,764 a year, or 23·3 per cent. That is, the decrease of jury trial and the increase of summary trial do not correspond: it was not simply a matter of a given number of cases being tried in one court rather than in another, but a rise in the total number of indictable charges. This might be explained in terms of an increase in the incidence of crime, an increasing population, increasing efficiency of police forces, and other factors. Such factors tend to give a steady rise, whereas here the figures for the total number of indictable offences, wherever tried, show a sudden rise after the statute came into force on 1st January 1880.

Year . . .	1875	1876	1877	1878	1879	1880	1881	1882	1883	1884
Indictable offences	49,996	51,935	53,848	55,983	54,993	60,724	60,620	63,268	60,795	59,589

The conclusion is that people would not prosecute many offences of small importance when such prosecutions involved trial by jury with its attendant trouble and expense, but that given a simple quick and cheap procedure there was greater readiness to resort to the courts.

[4] The figures given here, and used for the graph, are the numbers of persons for trial; it is inaccurate to refer to these figures as "trials," since two or more persons may be tried together, but it saves much repetition. Following the official statistics no distinction is made between pleas of guilty and of not guilty.

The Summary Jurisdiction Act, 1899, made further extensions. Adults became triable summarily for obtaining by false pretences and for some types of malicious damage, still with the 40s. limit. Summary trial of young offenders was also increased by this Act and by the Children Act, 1908. These changes appear to have had no marked effect on the proportion of jury trials. A decline of criminal jury trial from 1899–1900 is obvious on the graph, but this is a small fluctuation and the line is roughly level until 1915. The Criminal Justice Administration Act, 1915, raised the figure of 40s. in the Acts of 1879 and 1899 to £20, and made further slight extensions. The effect of this statute is difficult to gauge. It will be seen that trials by jury fell drastically in the following years, but those were the war years. Whilst there was some increase in the number of indictable offences tried summarily, the large drop was in the number of cases tried on indictment. In 1916 trials on indictment were less than half the number of 1914, and in 1917 and 1918 little more than half the 1914 figure. In the post-war years from 1919 stability was again reached, with the proportion of jury trials reduced from approximately 20 per cent pre-war to 16 per cent post war. The Criminal Justice Act, 1925, extended summary trial very considerably, scheduling a large number of offences of various kinds.[5] This schedule goes far beyond the larceny group and includes the less serious offences among most types of crime. Yet the effect has not been any substantial reduction in the proportion of jury trials. The only sharp decline since the war occurred shortly before the statute, and from the commencement of the statute (1st June 1926) the proportion rose slightly until 1932 and has since declined slightly, representing a normal fluctuation. The explanation appears to lie in an analysis of the figures of indictable offences tried summarily. Although the list of these offences is

Table I. Indictable Offences Tried Summarily

Annual average for years . . .	1900–1904	1905–1909	1910–1914	1915–1919	1920–1924	1925–1929	1930–1934
Larceny and allied offences without violence . .	44,680	49,123	48,632	48,266	47,451	52,265	54,664
Other offences .	955	1,204	2,335	3,469	2,912	4,226	5,816
Percentage of larceny group .	97·9	97·6	95·4	93·3	94·2	92·5	90·4

[5] The age for young offenders was fixed at 17 by Children and Young Persons Act, 1933, so that now all offences other than homicide committed by persons under 17 can be dealt with summarily. The current Criminal Statistics give in Appendix A a list of indictable offences, and in Appendix B a list of offences triable summarily, divided in (*a*) indictable, and (*b*) non-indictable.

now long and varied, it will be seen from Table I that the great bulk still consists of larceny and allied offences not involving violence. The increase of "other offences" tried summarily under the Criminal Justice Act 1925 is apparent, yet its effect is numerically less than the increase in small larcenies. If we turn to the total number of trials on indictment (Table II) there is an

Table II. Trials on Indictment

Annual average for years . . .	1900–1904	1905–1909	1910–1914	1915–1919	1920–1924	1925–1929	1930–1934
Total offences .	11,276	13,111	12,646	6,079	8,494	7,510	9,067
Larceny group, non-violent . .	5,449	6,322	6,191	2,552	3,084	2,251	2,566
Offences other than non-violent larceny group . .	5,827	6,789	6,455	3,527	5,410	5,259	6,501

obvious decline since pre-war years. When the non-violent larcenies are deducted, the number of trials on indictment since the war appears only slightly less than before the war. Thus whilst legislation of this century has undoubtedly led to a further decrease of jury trial in criminal matters, the most decisive element is the treatment of the larceny group. Appreciation of this point largely discounts the view that "The criminal jury is smouldering to extinction without protest and with little debate."[6]

It should be noted that when a defendant exercises his election between summary trial and trial on indictment the choice he has to make will be influenced by more than a preference for a mode of trial. Committal for trial involves waiting (perhaps in prison) and the possibility of a longer sentence if convicted. The scales are weighted in favour of summary trial.[7]

Civil Actions in the Superior Courts

It is convenient here to distinguish between the position before and after the Judicature Acts 1873–5. In the earlier period it is safe to say that questions of fact at common law were normally tried by a jury. Certain ancient modes of trial were theoretically possible at the beginning of the nineteenth century, but these were formally abolished.[8] The power of common law courts to determine questions of fact without a jury is difficult to appraise.

[6] A remark cited by Howard, *Criminal Justice in England*, (1931) p. 310.

[7] Howard, *op. cit.* p. 319 *seq.* discusses this question. More attention might be given to the advantages of wealthier defendants in getting legal advice at an early stage.

[8] Trial by battle, 59 Geo. III c.46 (1819); Wager of law, Civil Procedure Act, 1833; Real actions, Real Property Limitations Act, 1733.

Bacon's Abridgment, under the title "Trial," gives much authority for Trial by the Court, Trial by a Record, and Trial by a certificate; the authority cited in the 1832 edition already looks archaic. The unsatisfactory position of actions for an account shows the general attitude towards trial by jury. Procedure in Chancery was too dilatory for relatively simple matters. Common law offered the action of account, in which the liability to account would be determined by judge or jury (according as it depended on fact or law) and the account itself would be taken before auditors. Yet a plaintiff could sue in assumpsit, and insist on every item of the account being put before the jury, even when the Court considered such procedure to be quite absurd[9]. Chitty explained that legislative change was difficult because of "the antipathy to any invasion of the right of trial by jury,"[10] and not until the Common Law Procedure Act, 1854, did the Court obtain power to send accounts to an arbitrator. The same statute provided that the parties to an action could agree in writing that the decision of an issue of fact should be tried by the Court, if the Court saw fit to allow such mode of trial. It must also be remembered that the system of pleading might result in an issue of law, in which case the matter might never reach a jury.[11] The Matrimonial Causes Act, 1857, gave a right to trial by jury of contested matters in the new jurisdiction established by that Act. Jury trial was also extended to the Chancery Court by the Chancery Amendment Act, 1858, where the new power to give damages was supplemented by the possibility of having a jury to assess those damages or determine matters of fact if the Court saw fit. Very little use was made of this power, there being no juries at all in Chancery in 1867–8. There is difficulty in stating the prevalence of jury trial prior to the Judicature Acts owing to the form of the statistics; it is however clear that at common law trial was by jury in well over 90 per cent of the cases tried.

The Judicature Acts 1873–5 were not intended to make any changes in trial by jury, and expressly provided that Rules for practice made under these statutes should not affect the law relating to jurymen or juries.[12] The first set of Rules, scheduled to the Act of 1875, is in no way restrictive of jury trial. These Rules were thoroughly overhauled and replaced by "The Rules of the Supreme Court, 1883." Order XXXVI contained then, as it does now, the Rules as to mode of trial. The substance

[9] *Tomkins* v. *Willshear* (1814) 5 Taunt. 431.
[10] Chitty, *Practice* (1834) i, 22.
[11] Holdsworth, *History of English Law*, 3rd.ed. ix, 298 *seq.*
[12] Judicature Act, 1875, s.20, and s.22 by implication.

was this: The Court or a judge had an unfettered discretion to order trial with or without a jury in (*a*) matters assigned to the Chancery Division, (*b*) any matter which before the Judicature Acts could be tried without a jury without consent of the parties (that is, all Chancery actions and old Admiralty actions), (*c*) any matter requiring any prolonged examination of documents or accounts or any scientific or local investigation which could not in the opinion of the Court conveniently be made with a jury. In other matters there was a right to trial by jury.[13] It is material to note that "the rules under the Judicature Acts are rules of procedure only, and were not intended to affect, and did not affect, the rights of the parties."[14] Hence, in the opinion of the judges, Order XXXVI did not take away any rights to jury trial that existed previously, but did give power to order a jury where previously the trial would have been by judge alone;[15] on this view the effect of the rules was actually to extend the opportunity for jury trial. It is quite clear that these rules do not alter the old position except for (*c*) above: could the Court, prior to 1875, have ordered trial by judge alone in such cases? Lord Lindley said of this Rule that it "merely preserves the old practice of the common law Courts; there always was power in such actions as are there mentioned to order a trial without a jury."[16] Lord Lindley cited no authority for this, and I have not been able to find any;[17] however, the framers of the Rules of 1883 knew the old practice, and Lord Lindley, who was called to the bar in 1850, was not without experience of common law.

A Departmental Committee on Juries, whose Report was published in 1913, proposed some restriction on the right to a jury, suggesting that the right should be limited to cases where both parties agreed or where a case involved personal character of a party.[18] No change in the law was made until, as a result of the shortage of man-power in the later years of the war, the Juries Act, 1918, was passed. This provided that all matters in

[13] A distinction of practice was made in these cases, in that action of libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise of marriage a jury could be obtained by giving notice, whereas in other actions an application had to be made. Since the application could not be refused the practice was changed, and "summons for directions" covered all cases.

[14] *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602, *per* Lord Herschell L.C. at 628, citing previous cases to the same effect.

[15] *Jenkins* v. *Bushby*, [1891] Ch.484, C.A.

[16] *Jenkins* v. *Bushby*, *op.cit.* at 490.

[17] Lord Lindley's opinion hardly agrees with the view of the Court in *Tomkins* v. *Willshear* (1814), 5 Taunt. 431, cited above.

[18] Cmd. 1913–6817, paragraph 288. Two members of the committee, R. S. Gwynne M.P. and E. Harrison K.C., did not agree with this proposal. The Minutes of Evidence, Cmd. 1913–6818, contain much cogent evidence in favour of the restriction of juries.

the High Court should be before a judge without a jury unless the Court saw fit to order a jury; however a right to jury trial was preserved in cases alleging fraud, or libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, or contested matters in divorce, or the heir at law in a probate action.[19] The Juries Act, 1918, was passed to have effect during the continuance of the war and for six months afterwards. Before the expiration of this act it was replaced by the Administration of Justice Act, 1920, which in substance re-enacted the Juries Act, 1918.[20] Bills were introduced in Parliament in 1923 and 1924 for the restoration of jury trial; these were shelved on a government undertaking to deal with the matter[21] and in 1925 the Administration of Justice Act repealed the restriction of 1918 and 1920, thus restoring the position that existed prior to the Juries Act, 1918. The Supreme Court of Judicature (Consolidation) Act, 1925, was subsequently passed to codify the existing statutes; by s.99 (1) (*h*) Rules may be made for prescribing in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury, but by s.101 the Rules are not to affect the law relating to jurymen or juries. As a consolidation act it was not intended to alter the law,[22] so that presumably jury trial cannot be restricted by the issue of new Rules.[23] Complaints of the cost and delays in proceedings at common law led to the reintroduction of restrictive legislation in the Administration of Justice (Miscellaneous Provisions) Act, 1933.[24] This applied only to the King's Bench Division, and has taken away any absolute right to a jury. Jury trial is to be ordered where there is a charge of fraud, or the case is one of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, unless the Court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot be conveniently made with a jury. In other cases the Court has power to order a jury, and here it has recently been decided that the Court's discretion is quite unfettered, there being no

[19] In all cases an application for a jury had to be made within short time limits; R.S.C. (Juries Act), 1918.

[20] The Act of 1920 provided that the judge and not the jury is to decide upon evidence of foreign law; this was re-enacted by S. 102 of the Consolidation Act, 1925.

[21] 182 H.C.Deb. 5 s. 968.

[22] *Gilbert* v. *Gilbert*, [1928] P.1, in C.A. The Bill passed through all stages without a division: 186 H.C. Deb. 5 s. 2632.

[23] The New Procedure Rules, 1932, may conflict with this view, but I do not think the point was ever raised and it is of no importance since the changes of 1933.

[24] See 279 H.C.Deb. 5 s. 1599 *seq.* Restriction of jury trial was recommended by the Business of the Courts Committee, Interim Report, March, 1933.

obligation on the applicant for a jury to show any special reason.[25]

It may be useful to tabulate the dates of these changes.

1. From 1875 to July 1918: nominally no change from the law of pre-Judicature Act days.
2. July 1918 to October 1925: restriction on jury trial in all High Court matters.
3. October 1925 to September 1933: as during 1875 to July 1918.
4. September 1933 to present day: restriction on jury trial in Kings' Bench Division.

Relating these changes to the graph, we get the following points. In the King's Bench Division, jury trial immediately after the Judicature Acts 1873–5 stood at what was probably its old level, but a definite decline began quite soon. The steepest decline was in 1883, although the Rules of 1883 did not come into force until October of that year. The steep decline ended in 1887, and from then until 1917 there was approximate stability, jury trials averaging rather less than half of the cases heard. The establishment of the Commercial List in 1895 does not appear to have any marked effect. The result of a decline in 1917 and of the 1918 legislation was to reduce jury trial to a very small figure, yet here a substantial recovery took place in the post-war years although the war-time restrictions were still in force. The removal of these restrictions did not result in any great increase. The decline after 1932 is due to the New Procedure Rules (May 1932), under which a jury is in practice not ordered, and the statute of 1933. The restrictive Rules of 1883, and the restrictive Acts of 1918 and 1933 all came into force when jury-trial was declining: the removal of restrictions occurred when jury-trial was recovering. It appears that the predilections of litigants and their advisers, and the opinions and influence of the judges, have brought about changes; statute has merely accentuated changes that were already taking place. The figures of probate and defended divorce cases support this view. The Probate court, having a tradition differing from that of common law, was little affected by the Judicature Acts. Figures for defended divorce are available from 1896, and from that time it will be seen that the popularity of juries in such cases was much the same as in the K.B.D. Juries in Probate declined steadily during the war, whilst juries in divorce flourished exceedingly and then declined

[25] *Hope* v. *G.W.R.* (1937), 53 T.L.R. 399, noted in Vol. No. L.Q.R., 209. This decision may lead to some increase in the number of jury trials.

suddenly in 1918; both reached their lowest point in 1921. The restrictive legislation did not apply to divorce and did not cover all probate cases. The influence of the judges was undoubtedly in favour of trial by judge alone, since the divorce list became much heavier in 1918, and heaviest of all in 1919 and 1920. The lightening of the divorce list in 1921 may have helped the movement of return to juries in the divorce court. Both probate and divorce show increasing juries until 1926, and a substantial decline since then: the small use of juries in these courts during the last few years is not due to restrictive legislation, but to the simple fact that juries are not wanted. It is a pity that Assize figures cannot be compared with King's Bench Division figures, but the mode of trial on Circuit has not been published since 1921 and the Lord Chancellor's Department informs me that the figures are not now available.

County Courts

The County Courts Act, 1888, provided that in suits for more than £5 either party could require a jury of five jurymen, whilst in matters under £5 the judge had no power to order a jury; in Chancery and Admiralty matters there was no jury. Changes have been made on the same lines as for the High Court; that is, the Juries Act, 1918, the Administration of Justice Act, 1920, and the Administration of Justice Act, 1925, were applicable.[26] The Administration of Justice (Miscellaneous Provisions) Act, 1933, did not apply to County Courts, but similar provisions restricting jury trial were enacted by the County Courts (Amendment) Act, 1934, which was re-enacted by the County Courts Act, 1934.

In the case of County Courts the proportion of jury trials to cases heard before a judge alone is somewhat misleading. The figures for the early years of this century average rather more than 2 per cent for jury trials, falling to 0.07 per cent in 1919 and standing at a little under 2 per cent during the five years preceding 1935. But a comparison in percentages on this basis is undesirable because of changes in the division of work between the judges and the registrars. Further, prior to 1924 the figures for cases heard before the registrar included cases taken in the defendant's absence, whereas since then these figures are included under cases determined without hearing. I have accordingly worked out the number of jury trials as against the total judgments given.

[26] Jury trial is excluded in Rent Restriction Act and Housing Act cases. The County Court Act, 1903, raised the number of Jurymen to eight.

The number of jury trials per 1000 judgments are—

1894–1898	1·69	1914–1918	1·16	1934	0·47
1899–1903	1·28	1919–1921	0·13	1935	0·66
1904–1908	1·03	1924–1928	0·58		
1909–1913	0·92	1929–1933	0·59		

It will be seen from these figures that jury trial in County Courts has been of very little importance during the whole of this century. The restrictive provisions of the County Courts Act, 1934, came into force on 1st January 1935, with the result that jury trial in County Courts has practically ceased to exist.

Conclusion

The available statistics enable us to see what has happened and to see some at least of the formal causes. In civil cases we can say little more with certainty. It is said that juries are sought by a party who expects sympathy from a jury, and therefore a plaintiff in a running-down case or in an action against a wealthy corporation, or a defendant sued by a moneylender, will desire a jury. Running-down cases may account for the rise of jury trials after the war, but our statistics now give no analysis of the work of the civil courts. We do not know which party has asked for a jury, nor in what type of cases a jury has been desired. It is said that dispensing with juries saves time and money: if the taxed costs of jury and non-jury trials were analysed we might get some interesting results.[27] I do not mean to suggest that a proper statistical analysis can supply all that need be considered in evaluating modes of trial; to be successful, the administration of justice must satisfy public opinion, and sentiments, even when they appear a nuisance, cannot be just ignored. Opinion that is technically well informed carries some weight under our system, and hence it is desirable that there should be more data than is at present available.[28] There can be no universal formula for dealing with social matters, but quantitative thinking is essential.[29]

[27] From 1922 to 1933 the average number of days spent in hearing one case was: special juries, 1·7; common juries 0·8; judge alone, 0·9. Special juries account for about one third of jury trials in K.B.D. The comparison needed is between a number of similar cases tried in different ways.

[28] A notable attempt to get adequate information on jury trial in an American court is described in 43 Yale L.J. 867 (1934).

[29] For illustrations of the lack of such methods, see Sir Ernest Simon's essay in *The British Civil Servant*, p. 103 *seq.*

R. M. Jackson

STATUTES

The Ministers of the Crown Act, 1937

Constitutional lawyers may for some purposes look at documents which the pedestrian common lawyer must necessarily spurn if not with contempt at least as "not law." Accordingly, for the purposes of explanation and not for interpretation (the two are, unfortunately, not the same), we may quote the first paragraph of the explanatory memorandum of the Bill which became the Ministers of the Crown Act, 1937—

> "The main purposes of this Bill are two—
>
> (*a*) the removal of certain anomalies in the present standing of Ministers by adjustments and alterations in their salaries; and
>
> (*b*) the revision of the existing rules as to the allocation of Ministers between the two Houses of Parliament."

In carrying out these purposes the Act goes near to breaking the hearts of those who think with Dicey that constitutional conventions are "too high" for them. Not only is it impossible to understand the Act except in terms of constitutional conventions, but also it goes some way towards fixing and formalising conventions which hitherto have been somewhat doubtful owing to the absence of adequate normative precedents.

It applies to "ministers." There is, however, no definition of "ministers"; and indeed some of them, like the Lord Chancellor and the Law Officers, are not mentioned at all, since their share of public funds is already large enough not to need increase. The most important minister mentioned is "the person who is Prime Minister and First Lord of the Treasury," who is to receive £10,000 a year. This in itself is interesting, for it is only the second time that the person so designated has been mentioned in an Act of Parliament. The Prime Minister, as such, has no office known to the law; but under the Chequers Estate Act, 1917, he has a week-end mansion, and under the present Act he has a salary. But there is more in the provision than meets the eye. There have been Prime Ministers who were not First Lords of the Treasury. Lord, Salisbury, for instance, was so partial to the Foreign Office that for much of his long period of office he was Foreign Secretary, and the leader of the House of Commons was First Lord. This office was held, for example, by Mr. A. J. Balfour while his uncle was Prime Minister. There is nothing in the Act to prescribe that the two offices must be held together; but if they are not, neither the Prime Minister as such nor the First Lord as such will receive salaries. The difficulty can easily be overcome by providing salaries in the Estimates and enacting them in the Appropriation Act. This method was used for Mr. Lloyd George's ministers without portfolio, and for the National Government's minister for the co-ordination of defence and the "minister for thought" (when the National Government had one). Nevertheless, the method is disliked by the present Comptroller and Auditor-General and by the Public Accounts Committee, who do not hesitate to stigmatise it as undesirable that the Appropriation Act should be used to override other statutes. In the circumstances, and considering also that no Prime Minister can effectively manage a department (as Mr. R. MacDonald showed), it is reasonably certain that the constitutional convention is now established that the offices of Prime Minister and First Lord of the Treasury are one. It is sometimes forgotten

that since 1919 the First Lord, as such, has become a much more important person than he was before 1914.

Another consequence of considerable importance follows. There have been First Lords in the House of Lords. But there is much to be said for the view that the person in charge of the Establishments Branch of the Treasury (the main function of the First Lord) should be in the House of Commons. Theory comes to the aid of fact; for it may be said that the House of Commons being solely responsible for finance, all the Treasury ministers ought to be in that House and not in "the other place." Given that all the peers who have been Prime Ministers since 1850 have found difficulty in keeping their fingers on the popular pulse, that George V chose Mr. Baldwin in 1923, that Mr. Baldwin in 1937 said positively that it was impossible for him to be Prime Minister if he went to the Lords, and that the new Act seems to imply that the Prime Minister shall be in the lower House, it may be asserted reasonably definitely that a Prime Minister in the House of Lords is no longer possible.

The other ministers whose salaries are determined by the Act fall into two grades, which may be referred to as the grade of the heads of departments and the grade of the under-secretaries. The heads of departments are further sub-divided into three classes. The first contains the Chancellor of the Exchequer, the Secretaries of State, the First Lord of the Admiralty, the Presidents of the Board of Trade and of the Board of Education, and the Ministers of Agriculture and Fisheries, Health, Labour Transport, and the Co-ordination of Defence. Whether in the Cabinet or not (and it is obvious that, with the possible exception of the Minister of Transport, they must all be members of an ordinary Cabinet), they will receive salaries of £5000 a year each. The Act provides that the number of persons holding office as Secretary of State to whom salaries may be paid shall not exceed eight—but this does not prevent the appointment of additional Secretaries under prerogative powers and the payment of salaries under the Appropriation Act, provided that the additional Secretaries sit in the House of Lords. The ministers in this first class therefore number seventeen.

The second class consists of ministers who receive salaries of £3000 a year unless they are members of the Cabinet, in which case the salaries will be increased to £5000 a year. These ministers are the Lord President of the Council, the Lord Privy Seal, the Postmaster-General, and the First Commissioner of Works. The third class consists of one minister only, the Minister of Pensions, who receives £2000 a year. It is not provided that his salary shall be increased to £5000 if he becomes a member of the Cabinet; and it is obviously contemplated that no Minister of Pensions will receive that honour.

The salary of the Chancellor of the Duchy of Lancaster is not provided for by the Act. It is provided from the funds of the Duchy and not by Parliament; but it is enacted that if he is a member of the Cabinet his salary shall be increased to £5000 a year. In order that it may be determined whether a minister is a member of the Cabinet or not, it is provided that the date upon which any minister becomes or ceases to be a member of the Cabinet shall be published in the London Gazette. This does not apply to the Prime Minister, the Lord Chancellor, or the Law Officers, but only to the ministers mentioned above as belonging to the second class and to the Chancellor of the Duchy. It will be noticed that for the first time in the history of the British Constitution the Cabinet is now mentioned in an Act of Parliament. There is, however, nothing to prevent

the Prime Minister from keeping any minister out of the Cabinet; nor is there anything to prevent any other minister from being put into the Cabinet; but, if it is desired to increase his salary in view of his Cabinet duties, it will be necessary to override the present Act by means of the Appropriation Act.

The Under-Secretaries' grade is divided into four classes. First, the Parliamentary Secretary to the Treasury (i.e. the Chief Whip, though he is still not known to the law as such) receives £3000 a year and the Financial Secretary to the Treasury £2000. The Secretary for Mines and the Secretary of the Department of Overseas Trade (who are heads of departments subject to the control of the Board of Trade in the former case and the Board of Trade and the Foreign Office jointly in the latter case) will also receive £2000 a year. The Parliamentary Under-Secretaries proper—defined for this purpose as any Parliamentary Under-Secretary of State, the Parliamentary and Financial Secretary to the Admiralty (it is apparently intended that the recent practice of combining these offices shall be followed), the Financial Secretary of the War Office, the Civil Lord of the Admiralty, and the Parliamentary Secretaries of the other offices (listed in the 2nd Schedule), —will receive £1500 a year each. The Assistant Postmaster-General will receive £1200; and the Junior Lords of the Treasury will each receive £1000. The number of these officers in receipt of salary is strictly limited by the Act, but we need not go into details.

The Act next confers a pension of £2000 a year upon any person who has been Prime Minister and has taken oath as First Lord of the Treasury, provided that he has no political pension and no salary payable out of moneys provided by Parliament, the revenues of the Duchy of Lancaster, or the Consolidated Fund. All former Prime Ministers still living had the foresight to provide themselves with these qualifications. The Leader of the Opposition, also, for the first time receives legal recognition. He will receive £2000 a year. He is defined as that member of the House of Commons who is for the time being leader in that House of the party in opposition to His Majesty's Government having the greatest numerical strength in that House; and in case of doubt the Speaker will decide, his decision being final and conclusive. It is one of the ironies of history that a Government which by calling itself "National" impliedly denied that an Opposition existed first proposed to Parliament that the Opposition should be put on the statute-book and its leader given a salary. It now remains only for the Opposition to call itself, not merely His Majesty's Opposition (that is not yet on the roll of Parliament) but also "National Opposition."

The Prime Minister's pension and the salary of the Leader of the Opposition are charged on the Consolidated Fund and thus will not appear in the Estimates. The precaution has been taken of permitting the usual practice of proposing the reduction of the salary of a minister. It is enacted that where the salary is payable out of moneys provided by Parliament (i.e. in the Estimates), the statutory salary shall be the maximum, and accordingly the actual salary may be less. This will give another headache to anyone who ignores constitutional conventions as not being "law."

Finally, the Act deals with the distribution of ministers between the two Houses. The rule in existence before the Act was that there must not be more than six Secretaries of State nor more than seven Under-Secretaries of State in the House of Commons. This rule may be traced to Burke's

Economy Act, 1782, which abolished the third Secretary of State, but provided that if he was reappointed he should not be capable of sitting and voting in the House of Commons—thus limiting the "influence" of the Crown in the House of Commons. As the number of Secretaries of State was increased from three to six legislation was passed authorising additional Secretaries in the House of Commons and thus requiring one to be in the House of Lords. When the Secretary of State for the Dominions was created in 1925 no legislation was passed; and thus when the Secretary of State for the Dominions became a different person from the Secretary of State for the Colonies it was necessary for two Secretaries of State to be in the House of Lords. The Under-Secretaries followed the same rule until 1935, when the creation of an additional Under-Secretary of State for Foreign Affairs was followed by legislation increasing to seven the number in the House of Commons. The rule was, however, inconvenient, since it often prevented a rational distribution of offices among the available candidates.

The Act lays down the principle that all ministers whose salaries are provided by the Act may sit in the House of Commons. This principle is, however, subject to the following exceptions—

(*a*) Of the ministers whose salaries are fixed at £5000 whether they are members of the Cabinet or not, not more than fifteen may sit in the House of Commons. The total number of such ministers is seventeen; so that instead of two Secretaries of State the House of Lords is assured of two senior ministers besides the Lord Chancellor.

(*b*) Of the heads of departments whose salary is £3000 if they are outside the Cabinet and £5000 if they are in the Cabinet, not more than three may sit in the House of Commons. This means that one of the persons holding the offices of Lord President of the Council, Lord Privy Seal, Postmaster-General, and First Commissioner of Works, must be in the House of Lords. This represents current practice, though it was not prescribed by law.

(*c*) The number of "Parliamentary Under-Secretaries" in the House of Commons must not exceed twenty. Under the present practice (the number of such offices is flexible) this exception means that five or six junior ministers must be in the House of Lords.

W. I. J.

NOTES OF CASES

Contracts—Fraudulent Misrepresentation—Vicarious Liability

The liability of the master for fraudulent misrepresentation of his servants as laid down by Willes, J. in *Barwick* v. *English Joint Stock Bank*, L.R. (1867), 2 Ex. 259, had been extended in *Pearson (S.) and Son, Ltd.* v. *Dublin Corporation*, [1907] A.C. 351, to a case where the misrepresentation was not made by the fraudulent agent, but by the innocent principal to whom the agent had passed it on for that purpose. In *London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property and Investment Co., Ltd.*, [1936] 2 All. E.R. 1039, the doctrine was carried still further. The false representation had been made by an innocent agent acting on information received from another agent. The majority of the Court of Appeal rested their finding of fraud on this second agent's knowledge of the falsity of the information, but they treated as irrelevant the question whether he knew of the purpose for which his information was required. Thus a principal was held vicariously liable for fraud although no fraudulent intention had been proved against any one of his agents.

Mr. Patrick Devlin in an article in the last issue of the Law Quarterly Review has shown that this decision cannot be supported by previous authorities, and that it is clearly wrong on principle. The fallacy consists —as Mr. Devlin shows—in assuming that fraud is constituted by (*a*) the making of a false representation, and (*b*) knowledge of its falsity. What is really required is *conscious* knowledge of its falsity, i.e. knowledge of the falsity in making the representation.

The prediction of the learned writer that "in almost any form of action where a limited company or a principal and agent and a state of mind are involved, the decision is bound to be quoted as leading authority" and his wish that the point might then be reconsidered, have surprisingly soon been fulfilled. In *Anglo-Scottish Beet Sugar Corporation, Ltd.* v. *Spalding U.D.C.*, [1937] 3 All. E.R. 335, the parties had entered into a contract for sale and, by a subsequent agreement, had reduced the agreed charge. In disregard of the second agreement the defendant continued to charge the plaintiff at the unreduced rate. The demand notes were received and checked by a servant of the plaintiff who was unaware of the fact that the price had been reduced. He therefore passed the accounts on as correct and cheques were accordingly submitted for signature to the managing director who knew of the subsequent agreement but who, on account of the large number of cheques which he had to sign, did not know for which payments those cheques were intended.

In reply to the plaintiff's claim for return of the amount overcharged as money paid under a mistake of fact, the defendant contended that the payments were not made under a mistake but with full knowledge, since the knowledge possessed by the managing director could be imputed to the company. If by virtue of this principle it had been possible in *London County etc.* v. *Berkeley etc.* to charge the defendant with fraud, there could be no objection to apply it in the present case so as to establish the less serious imputation of knowledge.

This argument, again, was fallacious inasmuch as only conscious knowledge, knowledge in relation to an act in the law, can have legal significance. Thus, a person, to be fraudulent, must know that a representation is false *in making it*, and, in connection with a claim for money

paid under mistake, a person is mistaken unless he knows the correct state of affairs *in making the payment.* Atkinson, J. gave judgment for the plaintiff and discharged the unenviable task of reconciling his decision with that of the Court of Appeal by considering that the latter decision rested on the finding of "guilty knowledge" in one of the servants of the defendant company. The present position with regard to vicarious liability for fraudulent misrepresentation is best summed up in his words on p. 346: "It has been decided, in *Barwick* v. *English Joint Stock Bank,* that a man is liable for the fraudulent misrepresentation of his agent made directly by his agent to the third party. Then came *Pearson (S) and Son, Ltd.* v. *Dublin Corporation,* which decided that a principal is liable for the fraud of his agent although the principal himself innocently hands on the fraudulent representation to the third party. *London County etc.* v. *Berkeley etc.* went one small step further, that a principal is liable for fraud where the fraudulent information supplied by one agent is handed on to a third party through an innocent agent."

There is another important problem raised in the above decisions: Has any deliberate effort been made to cope with the difficulties arising out of the modern tendency towards specialisation in business organisation? Third parties may frequently be left without remedies against such organisations although in similar situations they would be protected against ordinary individuals. Seeing that the doctrine of vicarious liability cannot help in this respect, Mr. Devlin suggests that protection of the innocent third party could only be achieved by "a new cause of action or new legislation." It is, however, respectfully submitted that the existing range of forms of actions would suffice to meet the difficulty if the source of liability is not sought in the agent but in the principal.

The principal's liability has so far been made to depend upon whether there is a fraudulent or an innocent division of the ingredients of tortious liability. The practice of specialisation as such cannot possibly be held to amount to a fraudulent division. The judgment of Atkinson, J. shows that there can be no liability for fraud in the case of an innocent division of ingredients, unless it can be proved that an agent possessed a fraudulent intention. But this leaves still the possiblity of a negligent division of ingredients. It seems that, if damage results to a third party, a principal might well be found liable in negligence for failing to organise his business in such a manner that all information possessed by any department should become available to the department conducting business for which such information is material.

In respect of damage occasioned by negligent misstatements this introduces the question whether *Derry* v. *Peek* has not barred the possibility of such claims. This seems very doubtful in view of the expansion of the action of negligence. In any event, negligence in organising a business might result in damage occasioned, not by misstatements, but by other forms of harmful conduct.

J. U.

Contract for Personal Service

In *Warner Bros. Pictures, Incorporated* v. *Nelson,* [1937] 1 K.B. 209 the plaintiffs claimed an injunction to restrain the defendant, a well-known actress, from taking any part in any film or stage production for any other person contrary to the terms of her contract, and Branson J. had to consider the conditions which govern the granting of an injunction in the case

of negative stipulations contained in a contract for personal service. According to the general practice as defined by Lord Cairns in *Doherty* v. *Allman* (1877), 3 App. Cas. 709; 719, normally the Court has no discretion to refuse an injunction to restrain the breach of a negative stipulation, and according to the decision in *Lumley* v. *Wagner* (1852), 1 De G.M. & G, 614, rule is equally applicable to such a stipulation when contained in a contract of personal service. In the case of such contracts, however, this principle is limited by the well-established rule that the Court will not compel, either directly or indirectly, the specific performance of a contract of service. Consequently, to adapt an expression familiar in another connection in the law of contract, the injunction must end where specific performance begins. This line is not always easy to draw, but the Courts have acted on the principle that an injunction will not be granted where its effect would be to drive the defendant either to remain idle with the possibility of starvation, or to specific performance of his contract of service. The present case shows that under this criterion the freedom of choice left to the employee may be somewhat theoretical, for any difference between what he would be able to earn within the sphere still open to him after the injunction, and what his services would fetch within the sphere of the injunction is irrelevant. (See p. 217.) In the present case by limiting the injunction to services relating to any motion picture or stage production, the defendant would still be able to employ herself "both usefully and remuneratively in other spheres of activity, though not as remuneratively as in her special line." The injunction was further limited to a maximum period of three years, and its operation confined to the jurisdiction of the Court.

Two points of some interest in the law of Contract were raised in *Gaumont British Corporation Ltd.* v. *Alexander*, [1936] 2 All. E.R. 1686. The defendant entered into a contract to act for the plaintiffs for a year, and for such further period as might be added, and she agreed that during that period she could not without the plaintiffs' consent render any services whatsoever to any other person. She also undertook, among other things, not to do anything which might prejudice the public against her. It was further provided in the contract that in the event of the Corporation being unable to complete their productions, or to employ the plaintiff in them, her salary was to cease. When sued for refusing to perform her contract, the defendant contended in the first place that the contract was void for "want of mutuality" in that the Corporation were left free to employ her or not as they might see fit. The term "want of mutuality" although familiar in the United States is seldom used in England in this connection, where it signifies that the consideration is unreal or illusory, and the English decisions on the subject are not numerous. In the present case Porter J. was not prepared to hold that because there were many things which might preclude her from earning her salary the consideration was non-existent. It may be doubted, however, whether the analogy of a contract where it is left to the absolute discretion of an architect to decide whether any payment is due, which was suggested by the learned judge, is really applicable, for in that case it does not rest with the contracting party to determine whether or not he shall pay. The defendant also contended that the contract was void as being in restraint of trade. The arbitrator had taken the view that the restraint was not unreasonable, and Porter, J., was not prepared to upset this finding. Moreover, he declared that he was not aware of any case where a restraint had been held void where it was to operate

only during the progress of the contract, although he did not wish to decide whether such a case might not arise where the restraint was not justified by the employer's interest under the contract.

The same question was again raised in *Warner Bros. Pictures, Incorporated* v. *Nelson*, [1937] 1 K.B. 209, see at p. 214, where Branson, J., expressed his agreement with the view previously taken by Porter, J. It would appear, however, that in fact Branson, J., was prepared to go further than had been decided in *Gaumont British Corporation Ltd.* v. *Alexander* for he states that "where . . . the covenants are all concerned with what is to happen whilst the defendant is employed by the plaintiff and not thereafter, there is no room for the application of the doctrine of restraint of trade."

D. J. Ll. D.

Breach of Promise—Public Policy

At the risk of offending those who wince at the mention of Jurisprudence and those who refuse to believe that a decision can have any significance beyond the precise technical issue specifically raised, it must be said that the most interesting aspects of *Fender* v. *Mildmay*, [1937] 3 All. E.R. 402 are jurisprudential and methodological. The case is a rare and valuable example of the functional approach in English law, and a not so rare illustration of the stratum of sound truth in the realist philosophy of law. In addition it contains a useful, if not conclusive, discussion of the nature, scope and purpose of the concept "public policy" in the development of the Common Law.

It is not our purpose here to discuss at any length the realist definition of law. Two of its main propositions are implicit in these few words by a well-known critic of the theory: "The realists' conception of law, their substantive thesis is, ... the law is not a body of rules, not an ought, but a factual reality. It is the real behaviour of certain people, and especially of the officers of the law, more especially of the judges who make the law through their decisions, which, therefore, constitute the law." (Kantorowicz, *Some Rationalism about Realism*, 43 Yale L.J. 1240.) In other words, the law to fit an untried combination of facts does not exist until a decision is actually pronounced upon those facts, and that decision and not generalisations derived from previous decisions will be the law; these generalisations are useful, however, in predicting the course the judge will take, but his personal opinions and characteristics are also to be taken into account in arriving at the prediction. In *Fender* v. *Mildmay* the respondent's wife obtained a decree nisi for divorce on the ground of the appellant's adultery with the respondent. On two occasions after the decree nisi the respondent promised to marry the appellant after the decree had been made absolute but when the decree was made absolute the respondent refused to perform his promise, whereupon the appellant brought this action for breach of promise of marriage. Previous cases had settled that a promise to marry after divorce was against public policy (*Skipp* v. *Kelly* (1926) 42 T.L.R. 258), as also was a promise to marry after the death of a living spouse where the promisee knew that the promisor was already married. (*Spiers* v. *Hunt*, [1908] 1 K.B. 721; *Wilson* v. *Carnley*, [1908] 1 K.B. 729); but where the promisee did not know that the promisor was married it was held that this latter promise was valid (*Wild* v. *Harris* (1849) 7 C.B. 999; *Millward* v. *Littlewood* (1850) 5 Ex. 775). There was therefore considerable justification for the

view, based upon the decisions and dicta in these cases, that a promise to marry during the lifetime of a spouse is against public policy, except where the promisee does not know that the promisor is married. This was in fact the opinion of Hawke J., the judge of first instance, Slesser and Greene L.JJ., in the Court of Appeal, and Lords Russell of Killowen and Roche in the House of Lords. But the view which prevailed was that of Greer, L.J., in the Court of Appeal, and Lords Atkin, Thankerton and Wright in the House of Lords. The decision depended upon the interpretation given to the effect of the decree nisi, but it must be obvious that the divergence of opinion is due in no small measure to the judges' personal attitude to marriage and divorce. This must have been clearly present to Lord Wright when he said: "So far as I have been able to understand what is advanced as the basis of this particular new rule, it is that it involves the public interest in upholding the marriage state. That there is, in general, such a public interest I should be the last to deny. But the provisions of English law recognise a civil marriage and divorce. Whatever views a judge may personally hold on the public policy of these provisions, he must proceed on the footing that such is the law." In view of Lord Russell of Killowen's opinion that the "institution of marriage has long been on a slippery slope," and that "what was once a holy estate enduring for the joint lives of the spouses, is steadily assuming the characteristics of a contract for a tenancy at will," it is not surprising that he favoured a result which would do nothing to hasten marriage further down that slope. Even more illuminating are his objections to Mr. Herbert's Matrimonial Causes Act, as reported in *The Times* of July 20th: " . . . . It was a Bill mainly and essentially to extend the grounds of divorce, and that was why he, who was fundamentally opposed to divorce in any form, must vote against it. It was a terrible bill. . . ."

Of the greatest interest to readers of THE MODERN LAW REVIEW will be the fact that the majority of the House of Lords arrived at their decision by means of the functional method. For a careful exposition of this policy reference should be made to Dr. Felix Cohen's article in the first number of this journal. Briefly, it may be said that functional jurisprudence stresses the importance of the social effects of law, and redefines concepts and rules in terms of their consequences. In the majority opinions the functional approach is evident in the discussion of the possibility of reconciliation after the decree nisi, in the analysis of the decree nisi itself, and in the interpretation of the tendency of a contract. It was argued for the respondent that since it is the policy of the law to preserve intact the integrity of the marriage state, a promise to marry another made after the decree nisi must prejudice the possibility of reconciliation between the parties to the existing marriage, and that such promise should for this reason be held invalid. The majority rejected this view. "The fact, at any rate, is that, in an enormous proportion of cases, when once a petitioner has got as far as decree nisi, no reconciliation does, or in most cases, can take place. No doubt figures could be obtained, but, from the information available to the public, it is obvious that the number of decrees nisi that are not made absolute, in relation to those granted, expressed as a percentage, would be a minute fraction of one per cent." (Lord Atkin) "In all the cases, many hundreds in number, in which, sitting as a judge of assizes, I made orders nisi, I never heard of one in which the decree nisi was not made absolute. I cannot recall a single case in which there

appeared to me to be the slightest prospect of reconciliation." Lords Russell and Roche, however, were eager to protect at any cost this faintly remote prospect of reconciliation. It was further argued that the promise made to the appellant was made during the existence of marriage to another, and must tend to promote disloyalty, immorality and crime. The majority disposed of this by holding that there must be a general tendency to harm before promises will be held against public policy and there was no proof or likelihood that this would be the consequence here. Further, although technically the marriage continues until the decree is made absolute, in fact after the decree nisi only the shell of marriage remains. The minority of course, insisted on the technical interpretation of the decree nisi and held that in the contemplation of the law the marriage remains unimpaired until decree absolute. Very rarely does so clear cut an issue arise between the functional and the "ratio legis" methods.

Little can be said here of the discussion of public policy. Several of the Law Lords agreed that no new head of public policy could be developed to-day, although the only reason for this abdication of a function clearly exercised by former judges appears to be that it smacks of legislation. In these days when the declaratory theory of the judicial function is looked upon as a piece of antiquarian hypocrisy this reason will fail to convince a first-year law student. Lord Atkin, however, was not willing to hold that the categories of public policy are closed, although he agreed that they should not be lightly extended. ". . . . The doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds." A somewhat similar though narrower test for public policy is to be found in Lord Roche's judgment: "Now, to evolve new heads of public policy, or to subtract from existing and recognised heads of public policy, if permissible to the Courts at all, which is debateable, would, in my judgment, certainly be permissible only upon some occasion as to which the legislature was, for some reason, unable to speak, and where there was substantial agreement within the judiciary, and where circumstances had fundamentally changed."

The problem in this case did not strictly entail the development of a new head of public policy. It called for the resolution of a conflict between two well recognised heads of public policy—sanctity of contract and sanctity of marriage. The difference of opinion was the result of considering one principle the more sacrosanct and the other a derogation from it. This is an interesting example of the realist argument that plaintiff and defendant principles usually run together and the choice between them in any case will depend upon the personal outlook of the judge.

J. G.

Life Insurance and Suicide

Beresford v. *Royal Insurance Co., Ltd.* (1936), 52 T.L.R. 650, and [1937], 2 K.B. 197 (C.A.) has attracted a great deal of attention not only among lawyers but also among the general public. This was no doubt partly due to the dramatic character of the material facts—the insured shot himself in a taxi cab in St. James Street only two or three minutes before the policies on his life, totaling £50,000, expired. On the other hand broad questions of public policy in relation to insurance which were well within the comprehension of plain people were involved. Insurance plays an increasingly important part in modern life and there are several

problems involving the application of the doctrine of public policy which call for investigation, e.g. the conflict between *Tinline* v. *White Cross Insurance Association*, [1921] 3 K.B. 327 and *Haseldine* v. *Hosken*, [1933] 1 K.B. 822. Perhaps the House of Lords will shortly have the opportunity of elucidating these matters.

In *Beresford's Case* it was held by Swift, J., that *felo de se* by the insured committed for the express purpose of making insurance moneys available to pay his debts did not prevent his personal representative from recovering under the policy. The policy in question was "indisputable" subject to the conditions indorsed thereon. The only condition applicable to suicide made the policy void if the "assured should die by his own hand, whether sane or insane, within one year from the commencement of the assurance." In an action on the policy by the deceased's administratrix the defence was substantially based on public policy which it was contended forbade an insurer to pay on a life policy where the deceased had feloniously taken his own life. Swift, J., however, rejected this contention considering that the dominant public policy favoured sanctity of contract.

In the Court of Appeal where the unanimous decision was enunciated in a masterly judgment by Lord Wright, M.R. this view was rejected, and the broad principle was enunciated that it is contrary to public policy to allow a criminal or his representative to reap, by the assistance of the Courts, the fruits of his crime.

It may be observed that the Court was apparently in agreement with the view that the provision in the policy that the contract should be void if there was suicide within a year implied a promise that the insurers would pay the policy moneys in the event of suicide taking place at a later date. Public policy however, overrode this contractual obligation, and would have been applied by the Court even had the defence been based upon some other ground (see p. 583).

The judgment does not perhaps make it clear whether every case of felonious suicide would lead to the same result or whether it covers only cases where the object of the suicide can be shown to have been the recovery of the policy moneys. This important distinction is made in a note in 49 *Harvard Law Review*, p. 304. According to the *ratio decidendi* already mentioned the element of an intention to gain by the crime would appear to be essential. On the other hand the old case of *Amicable Society* v. *Bolland*, 4 Bligh (N.S.) 194 (*Fauntleroy's Case*) was much referred to and apparently approved in Lord Wright's judgment. In that case the assignee for value of a policy was prevented from recovering upon it because of the execution of the assured for the felony of forgery, a crime in no way connected with the insurance. It would appear that if *Fauntleroy's Case* is good the personal representative of a sane suicide could not recover upon the policy, even if it were clear that the reason for the crime was the pain caused by an incurable disease. It is obviously preferrable to take the more limited view that the suicide must have been committed for the purpose of making the policy moneys available to the insured's representative. The other would have the serious consequence of impairing the value of life policies for use as securities. We understand that questions are already being raised by mortgagees on this very matter.

The same result could be attained on a rather narrower doctrine, that is the principle of insurance law that every insurance is based upon the implied condition that the insured will not for the purpose of defrauding the insurer destroy the subject matter of the insurance, whether by taking

his own life, casting away his insured ship, or burning down his insured house.

It should be mentioned that the U.S.A. cases are discussed by Professor Goodhart in his article "Suicide and Life Insurance," L.Q.R., vol. 52, p. 575.

R. S. T. C.

International Air Traffic—Carriage by Air Act, 1932

The Carriage by Air Act, 1932, ratified for this country the Warsaw Convention, 1929, on the conditions of international air traffic. The significance of the statute has hardly been appreciated by internationalists or jurists. If the Hague Convention, 1922, and the Warsaw Convention, 1929, were put into operation by all the states which were parties to them international carriage of merchandise by both sea and air and international passenger traffic by air would be governed by one uniform legal system. Unfortunately the powers have been notoriously remiss over the Hague Convention and the position in regard to the Warsaw Convention is not much better.

The Hague Rules have met with much sarcastic criticism from English commercial lawyers and judges on account of faulty draftsmanship. It is curious therefore that the amount of litigation arising out of them in this country would hardly have paid for the bread and butter of one junior counsel over the whole period of their existence. The Warsaw Rules have not had such a hostile reception—one rather of cold indifference. Here too there has been a noteworthy absence of litigation. In 1936 however two cases came before the Courts within a very short period. They are not of any great legal interest, but are worthy of notice as embodying the first judicial consideration of the Warsaw Rules.

The only substantial point in *Grein* v. *Imperial Airways*, [1937] 1 K.B. 50 (C.A.) arose indirectly out of the fact that the Warsaw Rules have not yet become operative in Belgium. It became necessary therefore to consider whether a return ticket London–Antwerp–London is one contract for a journey from London to Antwerp and back, or two contracts, one for a journey from London to Antwerp and the other for the return. If it is one contract the Convention applies, if two, the Convention does not apply, since both place of departure and place of destination must be within territory subject to it. In *Grein's Case* the question was of importance because of the right of limitation of liability conferred upon the carrier by the Rules. It gave rise to a complete diversity of judicial opinion. The majority of the Court of Appeal (Greene, L.J., and Talbot, J., Greer, L.J. dissenting) overruled Lewis, J., considering that there was one contract of "international carriage" and that the defendants were entitled to limit their liability.

In *Westminster Bank* v. *Imperial Airways Ltd.* (1936), 42 Com. Cas. 1 the decision went against the applicability of the Rules. Article 8 of these provides that the air consignment note, the issue of which is compulsory under the Convention, must contain (*inter alia*) "a statement that the carriage is subject to the rules relating to liability established by the Convention." The defendants however had issued a note which stated only that in so far as international carriage was concerned it was "based upon the Convention of Warsaw." It was held that this was not a sufficient compliance with Article 8. It is perhaps worth noting that the consignment

note in *Grein's Case* was in the same terms, but the point under Article 8 was not raised.

R. S. T. C.

Separation Agreements

Following the decision of Kekewich, J., in *Re Gilling*, 74 L.J. (Ch.) 355, the Court of Appeal (Slesser and Scott, L.JJ., Eve, J., dissenting) held in *Kirk* v. *Eustace*, [1937] 1 K.B. 278, that a clause in a separation agreement whereby a husband agreed to pay his wife £2 a week during her life, subject to the usual *dum casta* clause and to the proviso that the payments should cease upon reconciliation, did not give the wife any right to claim against the husband's estate upon his death. Scott, L.J. (p. 286) observed that: "Conscious and deliberate action by each so as to ensure that they do 'live apart' is of the essence. It is both the original and continuing basis of the agreement. That basis is thus of necessity a fundamental condition the failure of which brings the agreement to an end simply because it has no application to such a state of affairs. It comes to an end because it predicates continuing action by both parties, and when one dies it cannot go on."

Eve, J., was equally positive in his dissenting view (p. 288). "Turning to the deed, its language is clear, simple, unambiguous and intelligible. No one can read it without appreciating that the payment of £2 is to continue during the lifetime of the wife." The House of Lords (Lords Atkin, Thankerton, Russell of Killowen, Wright, and Roche) have now unanimously adopted the view of Eve, J., [1937] 2 All. E.R. 715, holding that in the absence of a contrary intention a covenant binds a man's estate.

B. A. W.

Stop Lists—Demanding Money with Menaces

The decision of the House of Lords in *Thorne* v. *Motor Trade Association*, 53 T.L.R. p. 810, is important both legally and socially. Its legal importance is that it resolves a conspicuous disharmony between the civil and the criminal courts which has prevailed for the past ten years. Its social significance arises from the fact that it strengthens still further the support given by the courts to the price fixing and similar activities of manufacturers' associations.

The Motor Trade Association, one of the most formidable of these bodies, forbids its members to supply, directly or indirectly, any person whose name is placed on the stop list. Rule 15 enables the council or price protection committees of the Association to order the name of a member contravening its policy to be put upon the stop list, unless he pays within a stated time "a fine within limits to be laid down by the council." The question to be decided in *Thorne's* case was whether the rule was illegal or *ultra vires*, and whether an officer of the M.T.A., acting in pursuance of it, would be liable to punishment as a blackmailer.

In *Rex* v. *Denyer*, 42 T.L.R. p. 452; [1926] 2 K.B. p. 258, an official of the M.T.A. had been convicted in respect of a similar act under section 29 of the Larceny Act 1916, which provides that every person who utters, knowing the contents thereof, any letter demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing, shall be guilty of felony. In *Hardie and Lane Ltd.* v. *Chilton*, 44 T.L.R. 470; [1928] 2 K.B. 306, the plaintiffs had paid money

to the Motor Trade Association as an alternative to being placed on the stop list. After Denyer's conviction they sought to recover it by civil action. The Court of Appeal rejected their claim and stated, moreover, that they considered *Rex* v. *Denyer* to have been wrongly decided. Whereupon the Lord Chief Justice, at the next sitting of the Court of Criminal Appeal, announced that the Court of Appeal had no jurisdiction in criminal matters and that the Court of Criminal Appeal would continue to uphold the decision in *Denyer's* case unless and until the House of Lords might pronounce a contrary view.

This the House of Lords has now done in a unanimous decision. That they should do so is not in the least surprising in view of their decision in *Sorrell* v. *Smith*, [1925] A.C. 700 and the approval given in that case to *Ware and De Freville Ltd.* v. *Motor Trade Association* [1921] 3 K.B. 40. In *Ware and De Freville's* case the right of an association to use a stop list in order to promote the trade interests of its members was upheld. In *Sorrell* v. *Smith* the Lord Chancellor laid down the proposition that a conspiracy by two or more persons to injure another is actionable if damage results even though no unlawful means are used; but if the real purpose is to protect trade interest no tort would be committed. *Thorne's* case is the logical sequence of these earlier decisions. If the stop list is lawful, the less injurious alternative of a fine must also be lawful. Both are sanctions to enforce on the trade the observance of the association's price policy. Nevertheless Lord Roche and Lord Wright both emphasized that the fine must be reasonable in amount. If extortionate, it would become illegal both in a civil action and in a criminal indictment.

The law has moved far from the days of the old individualism when it sought to preserve competition. The real defect of the new doctrines is the unreality of their postulates. They assume business men *either* wish to ruin a competitor *or* to protect their own trade interests; the former being illegal and the latter lawful. In fact these motives are merged in modern commercial life. Traders and manufacturers plot the downfall of a rival in order to protect themselves. Here the law gives no guidance. Nor, be it noted, does it offer any protection to the consumer in this vital matter. (Reference may be made to the note on *Berg* v. *Sadler and Moore* in the previous issue of the MODERN LAW REVIEW, page 73.)

W. A. R.

Gold Clauses—Private International Law

The recent decisions concerning the interpretation of gold clauses in international contracts involve points of principle which have a bearing far beyond the limits of Private International Law. The gold clause is the most important, though by no means the only, attempt made by parties to a monetary obligation to give their legal relationship a status beyond the reach of governmental influence on currency. Reference to a given currency involves a submission of an obligation to the power of a governmental authority which determines and "manages" that currency. The use of money as a standard of measurement of an obligation, while freeing the parties from the inconveniences connected with barter, makes them dependent on the State, the currency of which they use. By expressing the *quantum* of the obligation in terms of an international commodity of assumed stable intrinsic value, the parties try to combine the advantages of a uniform standard of measurement with an avoidance of

the disadvantages entailed in the fluctuating and varying currency policies of various countries. Every decision upholding a gold clause works, therefore, in two directions: it helps to maintain an "international" element in a world of "nationalized" economics, and it assists individual parties in putting their relationship above and outside the "planning" on the part of government authorities. The gold clause has an international and, at the same time, an individualistic aspect.

If "gold" is mentioned in connection with a monetary obligation, four interpretations may be given to the promise—

1. It may be a promise to deliver gold bullion. In this case the obligation is not a monetary obligation at all, but the promisor is, in fact, a seller of gold. Such a promise will be easily defeated by legislation making the acquisition or the exportation of gold illegal. Unless the contract expressly lays down a duty to deliver gold bullion in kind, the Courts will not be ready to give this interpretation to a gold clause. In cases of doubt, gold is a standard of measurement and not a commodity. (See Hilbery, J., in *British and French Trust Corporation* v. *The New Brunswick Railway Company*, 154 L.T. 191.)

2. The reference to gold in the contract may be no more than a repetition of a statutory definition of a given currency. A good illustration is afforded by the decision of the Court of Appeal in *St. Pierre and Others* v. *South American Stores* (*Gath and Chaves*) *Ltd.*, [1937] 3 All. E.R. 349. In this case a lease of premises in Chile provided, *inter alia*, that the consideration was "93,500 pesos of 183,057 millionths of a gramme of fine gold monthly." The Court of Appeal, affirming Branson, J., interpreted this clause in accordance with Chilean law (which was the proper law of the contract) as "a mere statutory synonym for Chilean pesos," that being, in fact, the definition of a Chilean peso to be found in the Monetary Law of 1925" (*per* Slesser, L.J.). It is obvious that such a clause is not a gold clause at all. The words of the lease, as MacKinnon, L.J., pointed out, might as well have been: "The consideration shall be 93,500 monetary units of Chile—that is, pesos—as defined by the law of October, 1925." If the parties intended to raise the *quantum* of the consideration above the sphere of influence of the varying currency laws of Chile, their purpose was defeated.

3. While the reference to gold, if it is to be interpreted as in (1) as the sale of bullion or, as in (2), as the repetition of a statutory definition, cannot be called a gold clause proper, it is otherwise when the intention of the parties was to lay down a particular mode of payment in gold coins. In this case the obligation to pay "in gold" does not become a sale of a commodity; it remains an obligation to pay money. On the other hand, the necessity to pay in coins deprives the debtor of the opportunity of taking advantage of a depreciation of the currency in which the obligation is expressed. From the creditor's point of view, however, the disadvantage of the gold coin clause consists in the effect of legislation to which the debtor is subject and which makes it illegal or, at least, factually impossible for him to procure the gold coins wherewith to fulfill his promise. In such a case, the performance of the obligation becomes impossible and-under most systems of law, the debtor is relieved of the effect of the gold clause.

4. It has, therefore, been the constant endeavour of creditors to give to the gold clause the only interpretation which secures to them a stable amount of value, irrespective of fluctuations of currencies, that is, the

interpretation as a gold value clause. The difference between the gold value clause and the gold coin clause is that, while the latter refers to the *quid* of the payment, the former fixes the *quantum*. It enjoins the debtor to pay to the creditor so much money in the currency in which the obligation is expressed, as will, at the time of payment, buy the same amount of gold which at the time of the making of the contract could have been bought with the sum promised. In *Feist* v. *Société Intercommunale Belge d'Electricité*, [1934] A.C. 161, the House of Lords held that, if the proper law of the contract was English, a gold clause was, in cases of doubt, to be interpreted as a gold value clause; and the same interpretation was given by the Court of Appeal, in *International Trustees for the Protection of Bondholders* v. *The King*, [1936] 3 All. E.R. 407, to a gold clause which, according to the view of the Court, was subject to English law. It is remarkable that Lord Wright, M.R., referred to the necessity of giving a uniform international interpretation to such clauses, and came to his conclusions, *inter alia*, because of the fact that the Permanent Court of International Justice in the well-known cases of the Serbian and Brazilian loans, decided in 1929, had also adopted the construction of the gold clause as a gold value clause.

It is of importance that in *Rex* v. *International Trustees for the Protection of Bondholders*, [1937] 2 All. E.R. 164, the House of Lords, though it reversed the decision of the Court of Appeal, upheld the interpretation of the gold clause as a gold value clause. Lord Atkin, Lord Russell of Killowen, and Lord Roche expressed their agreement with the interpretation given to the gold clause by the Court of Appeal, though they differed from the Court of Appeal as to the law applicable to the contract, Lord Russell of Killowen expressing his view that "it would be regrettable if a uniformity in this respect did not prevail and that a different construction should be applied, except in cases where the 'Feist construction' is expressly excluded."

The importance of the gold clause as a means of securing the creditor against the effect of a depreciation of currency was first realized in the United States after the Civil War, and the use of the gold clause ("so many dollars to be paid in gold coin of the United States of the standard and weight and fineness existing on the day of making the contract") became almost universal in American loans. When, therefore, the United States went off the gold standard in 1933, it was found necessary to invalidate all existing and future gold clauses by legislation in order to prevent creditors from evading the effect of the readjustment of the dollar's purchasing power planned by President Roosevelt. But in view of the fact that a mere impossibility of procuring gold coins would not have had any effect on the gold clause if it was interpreted as a gold value clause, legislation had to be enacted which expressly invalidated gold coin clauses and gold value clauses as well. This was done by the by now famous Joint Resolution of Congress of 5th July, 1933, which enacted that "every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or *in an amount of money of the United States measured thereby*, is declared to be against public policy. . . ." This Joint Resolution which, as far as obligations other than those of the United States themselves were concerned, was subsequently held to be constitutional by the Supreme Court of the United States in *Norman* v. *Baltimore and Ohio Railroad Company* (1935), 294

U.S. 240, has been the object of litigation in many countries. The House of Lords in the Bondholders' case had to determine its effect upon a War Loan raised by the British Government in the United States in 1917, which contained the gold clause in its usual American form as to capital and interest. The facts were these: Under the powers of the British War Loan Act, 1916, the British Treasury, early in 1917, borrowed in the U.S.A. the sum of 250 million dollars on the security of 5½ per cent secured convertible gold notes repayable as to 100 million dollars one year, and as to 150 million dollars two years, after date. These notes were secured by the deposit of 300 million dollars worth of specified securities with the Bankers' Trust Company of New York on the strength of a pledge agreement of 1st February, 1917. They were redeemable by the British Government at any time and convertible at the option of the holder at or before maturity or earlier redemption into twenty years 5½ per cent United Kingdom Government Gold Bonds, repayable on the 1st February, 1937. In fact, about 143 million dollars were converted into bonds which contained the following clause: "Such principal sum and the interest thereon will be paid at the option of the holder either in the City of New York . . . in gold coin of the U.S.A. of the standard of weight and fineness existing February, 1937, or in the City of London . . . in sterling money at fixed rate of dollar of 4.86½ to the pound." After the U.S.A. had gone off the gold standard and the Joint Resolution had been enacted, the British Government refused to pay the bondholders more than the nominal amount of dollars' interest in New York, and they announced that they would act in the same manner with respect to the capital when it would become due. Some of the bondholders thereupon brought a petition of right before Branson, J., to have the effect of the Joint Resolution on the bonds determined. Branson, J., held that English law was applicable, that the gold clause was to be interpreted as a gold coin clause; and that, since its performance had become impossible under the currency legislation of the U.S.A., the British Government were excused by subsequent impossibility in view of the principle contained in *Ralli Brothers* v. *Compañia Naviera Soto y Aznar*, [1920] 2 K.B. 287. The Court of Appeal, reversing this decision, held that, although the learned judge was right in applying English law, he was wrong in interpreting the gold clause as a gold coin clause. He should have interpreted it as a gold value clause, and if he had done so he would, in the view of the Court of Appeal, have had to come to the conclusion that nothing prevented a creditor from enforcing it against the British Government in England. The Joint Resolution, though making it illegal for a creditor to claim in the U.S.A. the performance of a gold value clause, did not make it illegal or impossible for the debtor to perform it, that is to say, to pay to the creditor the amount of paper dollars required for the purchase of so much gold as was represented by the nominal amount of the obligation in 1917. The *Ralli* principle, therefore, did not apply and the British Government had to fulfill the gold clause. The House of Lords unanimously reversed the unanimous decision of the Court of Appeal and restored the judgment of Branson, J., but for entirely different reasons. They held that the proper law of the contract was American law and that, therefore, the Joint Resolution operated to vitiate the gold clause, whether interpreted as a gold coin clause or as a gold value clause. While in the view of Branson, J. and the Court of Appeal the Joint Resolution, if it had any effect at all, could only have an indirect operation under the *Ralli* principle as a ground of

impossibility, the House of Lords applied the Joint Resolution directly as a part of the American Law, which governed the loan.

The most important problem dealt with by, and the main *ratio decidendi* contained in, the various speeches in the House of Lords concerned a question of Private International Law: Which law is applicable to a loan raised by the government of one country in the territory of another State? It had been universally assumed that, according to English Private International Law, the obligation of a government in such a case was subject to its own law exclusively. This opinion was based upon two dicta by Lord Romilly, M.R., in *Smith* v. *Weguelin* (1869), L.R. 8 Eq. 198, and Lord Selborne in *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476. The same view prevails in some Continental countries, though a careful distinction is sometimes made between the formation and interpretation of the obligation and questions connected with its performance. (See the decision of the Reichsgericht of 14th November, 1929, R.G.Z. 126, 196.)

The House of Lords held unanimously that English law does not recognise a rule that where a sovereign state is party to a contract, its own law invariably applies. The ordinary principles govern the choice of the proper law even where a government is a party to the contract. This fact may be one of the circumstances from which an intention of the parties as to the choice of law can be inferred; it is "entitled to great weight in drawing the appropriate inference, but it is not conclusive and is only one factor in the problem." (*Per* Lord Atkin.) Lord Russell of Killowen, Lord Maugham, and Lord Roche concurred in this opinion; Lord Roche, however, only because he thought "this transaction was of a very exceptional character," so as to take it out of the principle that contracts made by a government are subject to the law of that government, a principle which, in the view of the learned Lord, is "still generally applicable to most transactions of the character of the transaction in question."

Though the case establishes that there is no rigid rule that government contracts are invariably subject to the law of the government, it must be observed that there may be circumstances in which a rebuttable presumption operates in favour of such an application. If a government loan is issued in various countries at the same time, it would be undesirable from a practical point of view to subject the contract to any law other than that of the debtor government, because this would lead to differences in the legal treatment of the different bondholders. This is even so where, as frequently happens, such an international loan is fortified by an *option de change*, i.e. by an option granted to the bondholders to claim payment in one of a number of places at a rate of exchange fixed in the bond. It is important to note that in the case before the House of Lords the loan was issued in the U.S. exclusively though there was an *option de change*. It is impossible to say whether the House would have arrived at the same result if the loan had been issued in more than one country.

It is noteworthy that no attempt was made on the part of counsel for the suppliants to argue that the application of the Joint Resolution would violate the principles of English public policy. In some foreign decisions (see the decisions of the Dutch Supreme Court of 13th March, 1936, in the *Royal Dutch* case and of the German Reichsgericht of 28th May, 1936, printed in Plesch, *The Gold Clause*, vol. 2 (2nd ed.), p. 8 and p. 30), the Court refused to apply the Joint Resolution on the ground of public policy, but in the German case only because the creditor was a German claiming

payment from a German corporation. It is to be welcomed that the House of Lords did not even consider the question of a violation of *ordre public international* on the grounds of retro-active interference with contracted rights. The principle of *ordre public international* should never be extended so as to afford protection against an even retrospective alteration of the law of the contract by the legislator to whose system the parties have submitted their relationship.

O. K.-F.

Income Tax and Rating

The rapid growth of outer London is notorious, and the glowing advertisements of the speculative builder offering houses for a nominal sum down and the balance over twenty years must have made one wonder how the finance was arranged; *J. Cronk & Sons, Ltd.* v. *Harrison*, [1937] A.C. 185, supplies the answer. For a house costing £625, the purchaser paid only £35 down while a building society advanced the balance—as this far exceeded the normal 75 per cent maximum advance, the builder was required to guarantee the difference and to deposit one-third of the excess with the society at interest, an out and out conveyance being made to the purchaser wherein receipt of the full sale price was acknowledged; the builder's deposits were released by the society when the guarantees became unnecessary. The Appeal Commissioners and Finlay, J., upheld the Crown's view that the full purchase price was a trading receipt at the time of sale, any loss under the guarantee being allowed when incurred; the builders had claimed the deposit was not a trading receipt until released, or alternatively that its "present" value having regard to all the attendant circumstances should only be included as a receipt at the time of sale. The Court of Appeal held the last alternative correct, and their view was affirmed in the Lords with a variation that if an actuarial valuation was, as suggested by the Appeal Commissioners, impracticable the deposits should be treated as trading receipts only when released—this latter view commended itself to the Lords, but as it had not been pursued by the company, it could only be brought in if a valuation was impossible. This view, however, does not seem in accord with *Inland Revenue* v. *John Emery & Son*, [1937] A.C. 91; in this Scotch case builders created ground-annuals over land and houses they had erected thereon and sold the latter for cash subject to these obligations, which in Scotland are marketable securities with a readily ascertainable value. The company claimed that the value of these obligations should not be brought in as a trading receipt unless and until they were actually sold; the House of Lords held that the builder's trading stock, i.e. land and houses, had been entirely disposed of for money and money's worth, i.e. the equivalent of a marketable security and that the value of the latter must be included as a trading receipt at the time the house was sold. Applying the *ratio decidendi* of this case to *Cronk's*, it would seem that the Court of Appeal was correct in including the "present value" of the deposits as a receipt at the time of sale, and that the bringing in of the deposits only when released was analogous to *Emery & Sons'* claim to bring in the value of ground annuals only when sold, which contention had been rejected by the Lords. The difficulty of valuation is no real obstacle, *c.f.* Lord Mackenzie in *Macpherson & Co.* v. *Moore* (1912), 49 S.L.R. 979: "If an Act of Parliament says the amount of profits is to be ascertained, ascertained they must be, whether it can be done in a satisfactory manner or not."

For nearly thirty years assessment authorities both for rating and income tax purposes have, in accordance with *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630, computed the annual value of licensed houses at the rent a hypothetical "free-tenant" would pay in the open market, disregarding the special rent competing brewers would offer so as to obtain the tie, except in so far as that raised the "market value" generally. Sect. 68, Rating and Valuation Act, 1925, defines the gross value as the rent at which a hereditament might be expected to let from year to year; in *Robinson Bros.* v. *Houghton, etc., Assessment Committee*, [1937] 2 All. E.R. 298, the Court of Appeal over-ruling the *Bradford-on-Avon* case, held that the valuation must take into account all relevant evidence and that no fact demonstrating the economic demand for the property, e.g. the demand of competing brewers, could be irrelevant or inadmissible as evidence. In Scott, L.J.'s opinion, the admissibility or otherwise of evidence of the rents such brewers would pay was the only point of law raised; the quantum of annual value was a question of fact dependent on the economic demand for the property, and there was no more reason to exclude the brewers as a special class of potential tenants than there would be, in assessing property in Harley Street, to ignore the higher rents doctors as a class would offer. The fallacy of the *Bradford-on-Avon* decision was that, by excluding the vitally relevant evidence of the high rents offerable by competing brewers on the ground that their motives were personal to themselves, it ignored the economic force of supply and demand on which the real rental value depended. It was contended the doctrine of *stare decisis* should apply, as the decision had stood and been acted upon for thirty years, but the Court held that if an old but wrong decision worked practical injustice—as the *Bradford-on-Avon* case did by relieving brewers from being rated on the true value of licensed houses so that other properties were over-rated—it was rightly overruled, *Westminster C.C.* v. *Southern Railway Co.*, [1936] A.C. 511, being followed. In *Whelan* v. *Leney & Co.* (cf. *supra*) the *Bradford-on-Avon* case had been quoted without disapproval in the lower courts, but it was not material for the decision of the House of Lords who held that the amount payable for the reversion and the tie in the case of licensed houses was a true rent—this seems to justify the decision of the Court of Appeal which may be expected to be upheld in the inevitable appeal to the House of Lords.

The cry of hard hit, or as some would say, badly organised, industries to the State for subsidies to assist them to meet foreign competition or low commodity prices becomes more vociferous every year; beet sugar manufacture is one of the favoured industries and by The British Sugar Subsidy (Assistance) Act, 1931, weekly advances were made to such companies on condition that they were repayable wholly or in part by deductions from subsidies under the earlier Act of 1925 if the price of sugar rose. The real point in *Smart* v. *Lincolnshire Sugar Co., Ltd.* (1937), 106 L.J.K.B. 185, was whether these payments were trading receipts assessable on the company or were loans liable to a contingent repayment, and therefore, being of a capital nature, not chargeable to income tax. The House of Lords had no difficulty in finding that they were proper trading receipts being given in order to enable the companies to meet their current trade obligations and hence assessable; the Court of Appeal distinguished this case from *Seaham Harbour Dock Co.* v. *Crook* (1931), 48

T.L.R. 91, where grants were made to the company by the Unemployment Grants Committee, on the ground that the payments there were made not to enable the company to trade to better advantage, but for the express purpose of engaging more men whereby the total of unemployment in the country might be reduced. At the time the sugar case was before the Commissioners there was a possibility of contingent repayment, but by the time it reached the Court of Appeal the payments made under the 1931 Act had become irrevocable owing to the fall in prices so that no contingency of repayment could arise; the judgment of the House of Lords did not rest upon this point but dicta in *Bwllfa and Merthyr, etc., Collieries, Ltd.* v. *Pontypridd Waterworks Co.* [1903] A.C. 426, to the effect that a Court should not shut its eyes to the true facts, though these could not be known when the point first arose, were quoted with approval.

A. F.

Secret Trusts

The decision of the House of Lords in *Blackwell* v. *Blackwell*, [1929] A.C. 318, finally established the doctrine of secret trusts as a branch of modern equity, but it left unsettled a number of important points in relation to the doctrine. It is clear that if a testator gives property to A in his will, apparently beneficially, and communicates to A in testator's lifetime his intention that A shall hold the property for certain beneficiaries, then whether that communication occurs at, before, or after the making of the will, the trust is effective. Prior to *Re Keen*, [1937] 1 Ch. 236, however, there was no express decision upon the effectiveness of a communication made *after* the date of the will by the testator to a person who takes in the will *as trustee*, no beneficiaries being there disclosed. In *Re Keen*, however, the Court of Appeal held that such a communication after the will was made was ineffective. The distinction seems somewhat illogical, and it does not exist in the United States, according to the *Restatement of the Law of Trusts*. If the judgment of the Court of Appeal is perused, it will be apparent that the court has virtually identified that branch of the doctrine of Secret Trusts with the doctrine of incorporation by reference in the law of wills. The two doctrines, however, are distinct. If, as Lord Sumner stated in *Re Blackwell*, "it is the communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the Law of Trusts, as applied in this instance to trustees, who happen also to be legatees," and if, as has been decided, communication and acquiescence *after* the date of making the will are sufficient where the legatee is taking in the will apparently beneficially, it is a little difficult to see why the case in which the legatee takes as trustee in the will must be distinguished on principle.

G. W. K.

Incorporated and Unincorporated Bodies

The cases of *Wurzel* v. *Houghton Main Delivery Services* and *Wurzel* v. *Atkinson*, [1937] 1 K.B. 380, illustrate the artificiality to which the legal difference between incorporated and unincorporated bodies leads in cases where they are in every other respect identical. Two societies had the same object of delivering to their members coal supplied to the latter by the colliery company at which they worked. Payment was made, by arrangement with the collieries, by deduction from the wages. The one society was

incorporated under the Industrial and Provident Societies Act, 1893, the other was unincorporated, being, in the words of Lord Hewart, rather in the nature of a club. Both Societies were indicted for unlawfully using C licences on vehicles carrying goods for hire and reward. The Divisional Court held that only the incorporated society could be charged with the offence. Lord Hewart said that in the case of an unincorporated association those who received the coal were among the owners of the vehicles and they could not be held to be hiring from themselves or rewarding themselves. The Court refused to apply, by analogy, the provision of the Road Traffic Act, 1934, dealing with the carriage of persons as passengers, where "society" was defined as meaning any association of persons whether incorporated or not (sect. 26). Lord Hewart also thought that it was difficult, in the case of unincorporated societies, to draw a clear line between associations consisting of many members (as in this case) and those consisting only of a few or even only of two partners. That difficulty certainly exists, but it arises equally under sect. 26 of the Road Traffic Act, 1934, which, as many statutory provisions must, leaves it to the Court to find a proper line of distinction on the facts of every case. In this case the two societies were absolutely similar, except for the incorporation, and it is unsatisfactory that the one should have "got away with it." This, of course, discourages incorporation, which is one of the greatest means of simplification and rationalisation of the law. The anomalous position of unincorporated societies, among them many associations with the strongest "moral" corporate personality and of the greatest social and economic importance imaginable is dealt with at more length in the review of Maitland's Selected Essays (*supra*, p. 93).

W. F.

We are indebted to a learned friend in Northern Ireland for the following note—

Murphy v. *N.I. Road Transport Board*, [1937] N.I. 22, is an instance of the way in which judicial interpretation of a statute may limit the scope of an administrative body and defeat what was in fact the intention of the legislature.

By sect. 5 (1) of the Road and Railway Transport Act (Northern Ireland) 1935, "the Board shall . . . acquire every road motor undertaking operated for reward or hire in Northern Ireland . . . but not including . . . (*c*) any road motor undertaking so far as the same was carried on immediately before the passing of this Act for a purpose excepted from the provisions of sect. 15 of this Act, by sub-sect. (4) of that section." By sect. 15 (1) "a person other than the Board shall not use a motor vehicle on any public highway for the conveyance of passengers or their luggage or the carriage of merchandise for hire and reward, except with the consent in writing of the Board and the approval of the Ministry of Home Affairs." A list of some twelve exceptions is set out in s. 15 (4), which includes "(*f*) the use of a motor vehicle by the proprietor of an hotel for the conveyance of hotel guests and their luggage to or from the hotel from or to a railway or omnibus station, quay or aerodrome."

The plaintiff, the proprietor of two hotels in Antrim, used two omnibuses partly in conveying guests to and from quays and stations and partly in conveying guests on advertised motor tours. The omnibuses were exclusively reserved for the use of guests who came to the hotels with

inclusive tourists' tickets. Upon his bringing an action for a declaration that the Board was not entitled to acquire this undertaking, it was held by the Court of Appeal (Best, L.J. dissenting), affirming the decision of Megaw, J., in the Chancery Division, that the operation of these omnibuses did not constitute a "road motor undertaking" within the meaning of the Act and that he was therefore entitled to the declaration he sought.

It would appear that three points were decided in the plaintiff's favour: (1) That he was not running a "road motor undertaking" within the meaning of the Act; (2) that the express exception in sect. 15 (4) (*f*) did not necessitate the application of the maxim *expressio unius, exclusio alterius*; (3) that, in any event, the statute created a monopoly and must, therefore, be strictly construed against any claim to interfere with private property. The first ground alone, of course, was decisive in favour of the plaintiff.

(1) It was suggested that the service was not a road motor undertaking as it was not open "to the public," and was not carried on "for hire and reward." And Megaw, J., found as a fact that "the user of the omnibuses is not anything in the nature of a general transport business, but is entirely incidental to the attractive hotel business [the plaintiff] carries on."

In the Court of Appeal, Andrews, L.J., holding that "the user of these buses has no feature in common with the user of buses engaged upon ordinary road transport services," said (at p. 33)—

> "I have no doubt that what the legislature refers to as a road motor undertaking is a business in which motor vehicles ply in the ordinary way for hire or reward at fixed fares and rates, transporting passengers and merchandise from one place to another in a service available to all members of the public."

Admittedly, the legislature was probably thinking of the type of service referred to by the learned Lord Justice. But does it necessarily follow that all other road motor services (exceptional cases) are excluded? When the legislature uses the word "man," it is probably thinking of a man with two legs: does this mean that a man with one leg (the exceptional case) is not included in the term? It is submitted that the general meaning of the word "undertaking" ("any business, work, or project; any enterprise"), which was adopted by Best, L.J., amply covers the case of the plaintiff. And there can be no doubt that, where a road motor undertaking was run in conjunction with another business, it was in fact the intention of the legislature that such road motor undertaking should be severed.[1]

(2) It was contended on behalf of the defendants that, as sect. 15 (4) (*f*) expressly excluded the case of taking guests to and from the railway, etc., the maxim *expressio unius, exclusio alterius* should apply, and that it should therefore be inferred that the Act includes and applies to any other road motor undertaking carried on by an hotel proprietor.

Provisos to any section of a Statute may be inserted either *ex abundanti cautela* or as exceptions. Andrews, L.J., held that the specific exemptions were inserted in sect. 15 by sub-sect. (4) *ex abundanti cautela*; but that, although the maxim might therefore apply, it was not mandatory, and he was not therefore bound to apply it in this case. "In truth," he said (at p. 36) "the fallacy which underlies any attempted universal application of the maxim to which I have referred is the assumption that the legislature had all possible purposes and uses present to its mind, so that the omission

[1] *N.I., Parl. Debates, H. of C.*, vol. xvii, 1934–5, col. 1974.

of one such purpose may be taken to be its deliberate act. In the present case I doubt if Parliament ever contemplated the case of hotel buses being used on such inclusive tours."

The Report of the Debate on the Bill shows that the specific point in this case was raised not only in the course of the second reading,[2] but also in Committee.[3]

The Act itself shows clearly that its aim was to create a monopoly, except for the exemptions set out in sect. 15 (4) (*f*). It is submitted that this in itself is conclusive against the plaintiff's claim, without the defendants being put to the necessity of calling in aid the maxim *expressio unius, exclusio alterius*.

(3) It was further held[4] that it was the duty of the Court "to apply the well-recognised principle of construction referred to in *Maxwell on Statutes*, 6th Edit., 515, and *Reed* v. *Ingham*,[5] that Acts of Parliament which create monopolies, interfere with general rights of the subject, or confer exceptional exemptions and privileges, correlatively trenching on general rights, are subject to the principle of strict construction." This principle, which arose in the eighteenth century, would appear to be directly contrary to *Heydon's* case,[6] in so far as it applies to those Statutes the main aim of which *is* to interfere with private property. Its application in these cases means that all "social legislation" is forced to proceed with a brake applied by the Bench.

Murphy's case is a strong argument in favour of historical interpretation of statutes—at least, in cases of "social legislation"—and *a fortiori* an argument in favour of Professor Laski's suggestion, in the Donoughmore Committee's Report, that an explanatory memorandum should be added to Statutes. It has been suggested that the historical method of interpretation would prolong litigation and increase its cost. In this case, however, much time and money would have been saved; a glance at the Parliamentary Debates would have prevented the plaintiff from bringing the matter before the Court.

[2] *Ibid*, col. 1750.
[3] *Ibid*, cols. 1953, 1995–7, 2005.
[4] Per Andrews, L.J., at p. 36.
[5] 3 E. & B., 899.
[6] 3 Rep., 7B.

J. A. Coutts.

REVIEWS

A CONCISE HISTORY OF THE COMMON LAW. By Theodore Plucknett. Second Edition. Butterworth & Co. 1936. **20s.** net.

This Journal, which intends to devote itself mainly to the study of law, as it functions, and of its relations to the other social sciences, cannot give much scope to detailed reviews of the historical learning of the law. But the line of demarcation between the history of law and the living law is not and ought not to be so sharp, as it sometimes appears and least of all in this country. No one ought to be more grateful for the existence of a book such as Professor Plucknett's masterly treatise than the lawyer who wants to study the living law in its social function. Here the very method is applied to the study of legal history, which we should like to see applied to the modern law. The political, economic, social and religious conditions which have made the law, are seen, in their true significance. It is admittedly more difficult to perceive clearly the social foundations of the law in one's own days than in the past. The distance of historical events makes respectable the same propositions which would often appear revolutionary and subject to strong political controversy, if applied to modern times. And yet the modern lawyer cannot afford to disregard these social foundations of the law, least of all, when society, national and international, is so rapidly changing as it is at the present day. It is in the nature of law that it must achieve stability, but it must not do so at the cost of reality. Professor Plucknett's book is eminently qualified to help the modern lawyer in finding the right way between the dangers of getting lost in technicalities and analysis on one side, and of destroying the stability of the law on the other.

FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW. By Eugen Ehrlich. Translated by Walter L. Moll. Harvard University Press.

Professor Ehrlich's work, here admirably translated, is not the systematic exposition of the sociology of law which the title suggests. It is rather a series of independent essays somewhat loosely linked, and all designed to emphasise from different angles the essential theme of the book, summed up by the author himself in the single sentence: "The centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself." The lack of system is not a fault but rather a merit, since it implies the candid recognition of the fact that the sociology of law is still in its initial stages of growth. It does, however, make the task of the reviewer difficult, especially as he is not a lawyer. All that he can attempt to do is to indicate what sort of problems a sociologist would expect to find in a work of this kind and how they are here handled. Perhaps the most important problems would be these: (i) what is the nature of legal norms, and how are they to be distinguished from other social norms, such as those of morals, religion, convention and fashion; (ii) what are the conditions, social, economic and political, under which legal rules arise and become differentiated from the other forms of social regulation; (iii) what influences are exerted by the various forms of social rules upon one another; to what extent, for example, is law affected in its historical evolution by changes in moral outlook; (iv) how is actual law related to ideal justice and are there

valid methods for studying this relationship? Prof. Ehrlich does not formulate the problems in this manner but he is in fact concerned with them and he has much of value to say on all of them.

In dealing with the general nature of law Ehrlich lays great stress on a distinction which he draws between "norms for decision," that is to say rules in accordance with which legal disputes are adjudged, and law in the wider sense as consisting of the principles of social organisation, that is the ways in which the relations between the members within any association are defined. The former are only a species with limited functions of the latter. Neglect of the distinction leads to an exaggeration of the compulsory element in law and to the view that the force of social norms is due universally to the coercive power of the state. Since law is ultimately an expression of the needs of associational life, an inquiry into the genesis of law should not confine itself to state law, but should deal with the way in which other associations, such as the commune, the kindred, the church and the like come into being and gradually build up a legal order defining their relationships. In this sense the sociology of law would be a part of the comparative study of social institutions which all leading sociologists recognise as the central task of sociology. Needless to say this large inquiry is not here undertaken but a valuable method of approach is indicated. Ehrlich finds that there are certain relations which he calls "the facts of the law" and which in various forms underlie all law. These are usage, domination, possession and declaration of will. Legal propositions arise in relation to these facts in one of three ways. They give enforcement to the relations, or they may control, hinder or invalidate them, or they may attach legal consequences to them other than those that directly follow from the facts. Law is built up by the generalisation or universalisation of rules so arising and by the gradual harmonisation of conflicting rules. The need for this reduction to unity arises historically when the inner order of associations breaks down in circumstances not originally provided for, or when, owing to changes in the distribution of power, a clash occurs between different associations and their spheres have to be delimited. Ehrlich refuses to be satisfied with the facile distinctions that have been drawn by many writers between legal and non-legal rules. His view is that at bottom this is a matter for social psychology. The different classes of rules release different feelings. Thus the feeling evoked by a transgression of a legal rule is different from that experienced when a moral rule is violated, and that again differs from the disgust evoked by indecency or the mild disapproval of tactless behaviour, or the snobbish superiority of the devotee of fashion when other fail to reach his heights. What is peculiar to legal norms is the reaction for which the Continental Jurists have coined the term *opinio necessitatis*. It is obvious that social rules cannot be classified without reference to their social setting. Thus the rules forbidding marriage outside one's rank have in the course of history been norms of law, of morality, of convention or fashion. The essence of the matter is that legal norms come to be provided for regulating relationships which, in the opinion of the group within which they originate, are of basic significance. But what is considered of basic significance and what of lesser importance is a matter on which different social organisations will decide differently. Hence what is at one time a moral rule may at others be regarded as requiring legal formulation, and conversely. There is some truth in the contrast frequently drawn between the heteronomy of law and the autonomy of morals. Legal rules have to be expressed

in definite and precise terms, while moral rules often afford little more than general guidance. Hence in the case of moral rules the individual must judge for himself and his inner attitude becomes all important. The chief difference between legal and other norms is not one of content but rather of degree of stability, certainty and general conviction as to their social importance. The question is evidently very complicated.

Ehrlich devotes an important chapter to the relations between the state and law. On the other hand, his discussion of the influence on law of economic factors is rather slight. He repudiates the theory that justice simply reflects the balance of power in a society and insists rather on its disinterestedness. But in this work at any rate Ehrlich has not really provided us with the data needed for an adequate analysis of the relations between changes in economic structure and changes in the law.

On the notion of justice and *richtiges Recht* Professor Ehrlich is more instructive on the critical than on the constructive side. All that a sociology of law can do, it seems, is to study the effects of legal propositions in relation to the scientifically ascertainable trends of social development. "If there is such a thing as *richtiges Recht*, or to be more exact *richtige Rechtsätze*, they are those that advance the human race in the direction of its future development." The present reviewer cannot see what ground there is for thinking that the direction in which society is moving is necessarily good or desirable. Not everything that is is good, nor we may be sure, is everything that is coming to be. An ethical criterion is needed, and Ehrlich shares the widespread view that the ends of conduct are not amenable to scientific investigation. But this is largely a matter of what is to be understood by the word "scientific." If anything is clear it is that the ends of social institutions cannot be ascertained without careful and methodical inquiry and that such inquiry is greatly needed. He would be bold indeed who could maintain that we know already or that nothing accurate can be done to ascertain (i) what ends are intended to be served, (ii) what ends are actually achieved, and (iii) what ends ought to be aimed at by the institutions, say of the family and marriage, of property, of war or of the criminal law. These questions are partly ethical and partly sociological, but they must all be tackled in a satisfactory study of social life. In short, at some point the sociology of law must be brought into relation with the philosophy of law.

In addition to the problems I have singled out for brief reference, Professor Ehrlich discusses numerous other topics of interest to jurist and sociologist alike, such as the theory of customary law, the codification of juristic law, the methods of the sociology of law and especially the methods of studying what he calls living law. The treatment throughout is singularly lucid and direct. Sociologists will welcome it as a valuable contribution to the comparative study of social institutions and as indicating fields of investigation in which sociologists and lawyers may co-operate with profit to both branches of study.

MORRIS GINSBERG.

THE ART OF LAW (and other essays juridical and literary). By JOHN C. H. WU. The Commercial Press Limited, Shanghai, China, 1936. xxi and 221 pp.

A lawyer whose study has acquainted him with systems so diverse as those of ancient China and modern America, who has practised and taught

in a country which is engaged in codifying its law largely on alien principles and has sat on the bench of such cosmopolitan courts as those of Shanghai, is bound to have a more vivid and ever-present sense of the ultimate realities which lie behind the legal structure than one pure-bred in a system which has long since separated its basic concepts from the amorphous mass of human relations and erected on them an elaborate and fairly firm body of detailed rules. It is this perpetual consciousness of the relation between law and life, this continual reference to the deepest foundadations of law in social purpose, that gives such freshness and charm to Professor Wu's collected essays and papers, whether he is discussing such subjects as "The Art of Law" or "The Function of Legal Methods in the Balancing of Interests," or, in the admirable essays on Mr. Justice Holmes, is paying the most becoming honour that can be paid to a beloved friend and teacher, that of expounding and analysing his thought, or is recalling cases in which he himself has been judicially concerned, or is jotting down in aphoristic form some of the fruits of his meditation. Professor Wu belongs to those who see in law "an endless series of vital processes of the balancing of interests," and in the judicial process an art in which "methods are only means to an end, that is, a just judgment," yet remember that the study of the conclusions reached in previous decisions is of little value (for the matter in which decisions are rendered is continually changing), compared with the study of the methods by which they have been reached.

There is also printed here a valuable essay on "Extra-territoriality in China," but most readers will probably turn, after they have read the more general and philosophical papers mentioned above, to two essays on Chinese law, one discussing the respective scope given in the modern Civil Code to the principle of fault and to that of liability without fault, the other making a general comparison between the new Chinese civil law with its western atmosphere (the author aptly quotes from Professor Jenks) of a business meeting at which "the only object is to get affairs straightened up as quickly as possible" and the traditional law so permeated by the spirit of Confucian morality that the judge even in civil cases assumed the role of a father, sometimes gently admonishing, sometimes sternly rebuking and chastising, any of the parties concerned whose conduct had been inconsistent with the eternal principles. A debtor who failed to discharge his obligation might be flogged in addition to being compelled to pay in full, because failure to pay a debt was a breach of faith, a moral wrong needing rectification and deserving punishment. There was thus no formal distinction between civil and criminal law; strictly speaking, there was no civil law, certainly no law of property or contract as such, because of the refusal to recognize a non-moral sphere in which the mere "cash-nexus" constitutes a legal relation between man and man. One is momentarily tempted to seek a comparison with modern doctrines which teach that rules of law should be fluid and that the judge should decide in accordance with "healthy popular sentiment"—but the Chinese judges had an elaborate system of ethics behind their judgments. A more profitable comparison might perhaps be found in the development of the notion of conscience by ecclesiastical lawyers.

Some readers may feel that these papers are just a trifle lacking in solidity. The author's touch is very light: most of his essays are short; he skims over his subject, he drops a hint, an allusion or a quotation, and passes on. He might have given more illustrative instances, developed his arguments, worked on a larger scale. But this may to some extent (like

the occasional verbatim repetition in one essay of quite long paragraphs from another essay originally published on a different occasion) be due to the circumstances in which these papers were first composed and published. And this very slightness, ease and informality have a charm of their own.

A. H. CAMPBELL.

THE COMMERCE POWER VERSUS STATES RIGHTS. By EDWARD S. CORWIN. Princeton University Press. Humphrey Milford. **11s. 6d.** net.

Prof. Corwin's book, which bears the motto "Back to the Constitution," deals with what seems to be a purely American subject, the interpretation of the Interstate Commerce Clause of the Federal Constitution. It is, however, of general interest as a demonstration of the way in which the Courts are able to change the meaning and purpose of enacted law by varying standards of interpretation. It affords strong proof that the principle of precedent is impotent where it meets with the more powerful force of economic interests, particularly if they are fortified by "doctrinal antecedents." The Constitution of the United States provides in Art. 1, sec. 8, that Congress shall have power, *inter alia*, "to regulate commerce with foreign nations, and among several States, and with the Indian tribes." Prof. Corwin shows in a convincing manner how in the course of the last 120 years the Supreme Court has thrown overboard the original construction of these words, so as to fetter Congress in the exercise of the power, and with the result of disabling it from enforcing a uniform standard of social and economic conduct on those engaged in interstate trade. In the first half of the nineteenth century the Interstate Commerce Power was held to be co-extensive with the Foreign Commerce Power; but in spite of what would appear to be the unambiguous wording of the constitutional text, the opinion has been gaining ground since the beginning of this century that restrictions were to be imposed upon the exercise of the Interstate Commerce Power which were held not to exist in the case of the regulation of foreign trade. Congress, though undoubtedly entitled to regulate the trade in foreign goods for any purpose whatsoever and to prohibit, if necessary, commerce in foreign goods of a given description, was held in the famous Child Labour Case, *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), to act *ultra vires* when prohibiting interstate transportation of goods manufactured by child labour. According to the present view of the Supreme Court which found expression in several of the New Deal cases, Congress may not prohibit interstate transportation of goods for the purpose of promoting the general welfare of the country, though it may regulate it for the purpose of furthering commerce itself. On the other hand, it is beyond the powers of the States to interfere with interstate commerce, as this is dealt with in the Federal Constitution. A gap is thus created between the spheres of federal and state powers, and in a number of important matters neither can be exercised. The result is that the Courts have converted a constitutional provision enacted with a view to strengthening the Central Government into an instrument of *laissez-faire* against any governmental—local or central—regulation whatsoever. Prof. Corwin's investigation, conveniently arranged in six theses stated and proved with ample material, culminates in an inquiry into the question whether "production is a subject which is segregated to the reserved

powers of the States," and whether "Congress's purpose in enacting a measure is a judicially enforceable test of the validity of such measure if it invades the ordinary domain of the States." The latter question, of course, goes to the root of the problem of judicial constitutional review. The book, apart from being an admirable example of what a treatise on the much neglected subject of modern legal history should be, shows that the functional approach is more than a theoretical whim of a few learned professors and that it can furnish practical results of the highest value. Perhaps it is too bold to express a hope that this book on the American Constitution, like so many others working in the opposite direction, may become the "doctrinal antecedent" of a new departure in the development of the Supreme Court.

O. Kahn-Freund

PEACEFUL CHANGE. An International Problem. Edited by C. A. W. MANNING. MacMillan & Co. 1937. **5s.** net.

This small volume represents an extremely valuable attempt at tackling an international problem of outstanding practical and theoretical importance, by collaboration between historians, economists, sociologists, psychologists and lawyers. It was probably mainly the German demand for restitution of colonies, which pushed the problem of peaceful change recently so much into the foreground—although the problem itself has, of course, an infinitely wider significance—and made the International Studies Conference choose it as a subject for treatment. That again led the London School of Economics to invite a number of distinguished representatives of the various social sciences above mentioned to lecture on the problem of peaceful change, from the particular angle from which the historian, economist, socialist, psychologist or lawyer would approach it. The decision to publish this series of lectures is greatly to be welcomed not only because they tackle in an admirably dispassionate and scientific way a problem much obscured by nebulous thinking and political controversy, but because this experiment might stimulate similar collaboration between the various social sciences in the study of other problems, not only in the field of other international relations. That problems of international relations lend themselves particularly to such an approach, lies in the rudimentary nature of international society, where law is not so neatly distilled from the other fields of social life as within the states.

Unfortunately, scientific approach here, as in many other cases, does not produce those clear if crude results by which men of action especially in our days have gained the distinct supremacy over the rational approach of science. Some of the lecturers are optimistic, some sceptical, and the concluding lecture of Professor Manning reflects many of these doubts. Space does not permit to go into details, and the following remarks may suffice. The legal aspect of the problem is exhaustively considered in an admirable lecture of Dr. Lauterpacht who makes it quite clear that any real solution of the problem of peaceful change means international legislation, and nothing less. And perhaps one clear result emerges from all the lectures: that as long as the present hypertrophy of nationalism and national sovereignty emphasises and increases the importance of boundaries, with all the political, legal and economic consequences that entails, it will not be possible to devise any satisfactory system of peaceful change as a permanent part of international organisation. But

an even more fundamental question is ignored, perhaps consciously, in all the lectures—whether it is fruitful to discuss any institutional change, whether by means of an equity tribunal or by an international parliament or in any other way, at a time when the very existence of international society is in doubt because of the growing divergence in the attitude of its members towards the principal social values (life, liberty, property). All the lecturers still seem to assume that the family of nations, fragmentary as it is, is unimpaired in its structure.

W. Friedmann.

THE LAW OF SUCCESSION, TESTATE AND INTESTATE. By David Hughes Parry, M.A., LL.M., *Professor of English Law in the University of London.* London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. xlvii and 311 pp. **15s.**

Until now there has not been a small book dealing with Succession as a whole which could be recommended to the beginner, and this book will be appreciated particularly by teachers of an important and difficult subject.

In his Preface the author states that the work is based on a course of lectures delivered by him in the University of London, and to this it probably owes much of its merit, for the book is an exposition, not a mere statement. As a good teacher should, the author gives to the student a rational explanation of the law, and shows him that for those with an inquiring turn of mind there are fields waiting to be explored. One may wish that the author had been more ready to state his own view, but it is one of the merits of this book that no one who has read it can have any excuse for thinking that the last word has been said. In dealing with the right of retainer, for instance, the author gives a brief explanation of the origin of the right, or rather puts before the reader three such explanations which have been offered, together with a quotation from the judgment of Lord Atkin in *A.-G.* v. *Jackson*, giving his views of the matter. Having done so much, the author leaves it to the reader to adopt what view he pleases. "Whatever may have been the reason for its original recognition, the right has been long and well established," says Professor Parry. Which seems to mean that, after all, it does not matter very much. This strikes one as rather characteristic of the book.

Professor Parry expresses the hope that, in the absence of any other concise work covering the subject, it will be found helpful by practitioners generally. Probably it will. One practitioner at least has already found it helpful. Seeking for authority to convince a client that where there is a gift by will to two people in equal shares, and one of them dies before the testator, the survivor does not ordinarily take the lapsed share, he noticed Professor Parry's work fresh from the publishers. Looking in the index under "Lapse," he was able to find almost instantly a clear statement of the law on the point, supported by relevant authorities.

Of course, this does not mean that the book contains all that the practitioner is likely to require. Although for so small a work it contains a surprising amount of information, it is too small to be a safe guide on a subject so vast, particularly when it deals, as this book does, with such things as death duties and the administration of estates. The author has not been able to devote more than thirty-one of his precious pages to construction of wills, and this no doubt accounts for the omission to

mention the rule in *Sibley* v. *Perry*, or to point out the dangers inherent in the use of words of futurity. Probably considerations of space also prevented the author from dealing adequately, if at all, with the subject of repugnant conditions, which is important in practice. The defects of Professor Parry's book are, in the main, defects inseparable from any book of its kind.

G. L. HAGGEN.

THE LAW OF TRUSTS. Second Edition by G. W. KEETON, M.A., LL.D. London: Pitman & Sons, Ltd. lii and 412 pp. **25s.** net.

That a second edition of Dr. Keeton's book on Trusts should be called for within three years is a sufficient indication of the approval with which it has been received. The text has now been brought up to date and a few important additions made. The reconstituted first chapter provides the best treatment for a student of the distinction, so often puzzling, between trusts and other legal relations, though more space could profitably have been devoted to the distinction between trusts and contracts. This point, however, will be of lesss importance if the recommendations of the Law Reform Committee in favour of third party beneficiaries are given statutory force, since the Courts will no longer have to do violence to the trust concept, in order to reach a just conclusion, as was the case in *Harmer* v. *Armstrong*, [1934] Ch. 65.

The rules about appointment between capital and income have been restated, though Dr. Keeton still finds difficulty in gauging the extent of the decision in *Re Brooker*, [1926] W.N. 93, which involved an express trust for sale, not a statutory trust on intestacy as is stated at p. 255. Perhaps the uncertainty can in part be attributed to the double content of *Howe* v. *Lord Dartmouth*, which, firstly, imposed a duty to convert in certain circumstances, and, secondly, prescribed a mode of apportionment pending conversion between tenant and remainder man which is similar to that adopted in other cases where conversion is temporarily deferred. It is misleading, but quite common, to refer to that mode of apportionment as the rule in *Howe* v. *Lord Dartmouth*, as P. O. Lawrence, J., does in *Re Brooker*. The duty to convert, as laid down in *Howe* v. *Lord Dartmouth*, is unaffected by the legislation of 1925. The method of apportionment where leaseholds are held on an express trust for sale has been altered (*Re Brooker*), and the question is whether this change affects leaseholds where the conversion is ordered by equity under the rule in *Howe* v. *Lord Dartmouth* proper. With all respect to Dr. Keeton, it is submitted with confidence that *Re Brooker* would be followed.

The recent cases on s. 31 of the Trustee Act, 1925, are embodied in the text, including the rather surprising decision in *Re Turner's Will Trusts*, [1937] 1 Ch. 15, (not commented on by the author), where the Court of Appeal overruled the views expressed by three of the Chancery judges. Dr. Keeton continues the excellent practice of quoting as extensively as possible from statutes and judgments, and of giving the facts of leading cases quite fully in the text. Teachers of the Law of Trusts are grateful to him for bringing his valuable work up to date.

D. W. LOGAN.